

Easements in a 3D World: Underground Wealth, Surface Flow, and Railroads

Maryland Presentation
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Wisconsin – effect of common law (1) Milwaukee v. State: 193 Wis. 423; 214 N.W. 820; 1927

- ▶ All litigated cases must be decided according to law, **either statutory or the common law.**
- ▶ Where the **legislature has enacted statutes within the proper field of legislation** and not violative of the provisions of the federal and state constitutions, its edicts are supreme, and they cannot be interfered with by the courts;

Wisconsin – effect of common law (2) Milwaukee v. State: 193 Wis. 423; 214 N.W. 820; 1927

- ▶ and where **legal principles have been laid down by the courts in the proper exercise of their judicial functions** and have **continued in force for such a period as to create vested rights, ...**
- ▶ ...such principles **are clothed with a force possessed by a statutory enactment**, and should be recognized and applied ...

What was actually transferred?

- ▶ Mineral interests come in many forms:
- ▶ Subterranean estates (coal seams)
- ▶ Profit a Prendre
- ▶ Lease for a limited time span
- ▶ Rights of access (incorporeal hereditaments, easements)
- ▶ Water – while not generally considered a mineral, it may be from surface flow, or from springs creeks, or wells.

What is a Mineral Estate?

COLORADO – Variety of Interests

McCormick v. Union Pacific 14 P.3d 346 (2000)

- ▶ A reservation is a vehicle by which a grantor creates and reserves to the grantor some right or interest in the estate conveyed, which interest had no previous existence.
- ▶ The grantor **may reserve a wide variety of interests**, such as **easements, profits, timber, water rights, or mineral rights**. As one commentator notes: "The grantor conveys away an estate and receives back, in the classic metaphor of property law, **one of the sticks in the bundle of ownership.**"
- ▶ We hold that Colorado adheres to the majority rule that the deed reservation language "other minerals" reserves oil and gas.

License vs. Grant: Maryland (1)

Nicholai v. Baltimore: 100 Md. 579; 60 A. 627; 1905

So in *Petroleum Co. v. Bliven Co.*, 72 Pa. 173, which was an action on the case under an agreement to lease the exclusive right of boring for oil upon certain described lands, the Court through JUDGE SHARSWOOD held, 1st, **that the grant was of a mere incorporeal hereditament...** Where the grant by its terms does not purport to demise the lands or the minerals therein, **but operates only as a license to dig and mine throughout the lands**, ejectment will not lie unless he has actually opened and worked the mine, for until then the right is incorporeal.

Kentucky. – Nature of Mineral Estate (1)

Gabbard v. Sheffield: 179 Ky. 442; 200 S.W. 940; 1918

- ▶ The essential thing in construing a contract is to determine from it, if the writing is unambiguous, the intention of the parties, and when the intention is ascertained, to enforce its provisions according to such intention.
- ▶ That an estate in lands may be divided by the owner and **separate estates carved out of different elements**, which go to make up the lands, there is no doubt. One may be the owner of the **surface** of the land, another the **trees** standing upon it, and another the **minerals** under the surface, and **all of them be the owners of lands.**

Kentucky. – Nature of Mineral Estate (2)

Gabbard v. Sheffield: 179 Ky. 442; 200 S.W. 940; 1918

- ▶ In *Kincaid, etc. v. McGowan, etc.*, 88 Ky. 91, it was said:
- ▶ **"Minerals in place are land.** They are subject to conveyance. The surface right may be in one man and the mineral right in another. Both in such a case are landowners. They own separate and distinct corporeal hereditaments."
- ▶ "The **owner of land may convey a surface estate in fee in it and reserve to himself an estate in fee in the minerals.**
- ▶ ...or any particular species of them, in which case the vendee holds a **distinct and separate estate** in the surface, or soil, and the vendor holds a distinct and separate estate in the minerals.

Owners of Mineral Rights: Virginia. (1)

Iron & Coal Co. V. Kelly: 93 Va. 332; 24 S.E. 1020; 1896

- ▶ **In minerals under the land and the surface of the land, distinct freeholds may be created and owned by different persons** by separate and independent titles.
- ▶ One may own the surface, another the coal, and another still some other mineral, all within the same parcel of land. Each may have a fee or less estate in his respective part.
- ▶ The owner of the surface of a parcel of land and the owner of the minerals under the same are **not joint tenants, nor tenants in common.**

Coal is not an "Easement": Virginia (2)

Iron & Coal Co. V. Kelly: 93 Va. 332; 24 S.E. 1020; 1896

- ▶ The owner of mineral rights, holding by virtue of a reservation in a deed, is neither a tenant in common, nor a joint tenant with the owner of the surface. Each has a separate estate.
- ▶ **In other words, mines are land, and subject to the same laws of possession and conveyance.**
- ▶ **There is no more reason for considering the coal an incorporeal hereditament,** because it has not been opened, than there is for considering the soil such because it has not been plowed.

COLORADO: What is a Mineral?

McCormick v. Union Pacific 14 P.3d 346 (2000)

- ▶ The reservation of a mineral estate necessarily **severs it from the surface estate, creating multiple estates** in the same land.
- ▶ **The word "mineral" can be used in different senses,** depending upon the context. For example, "the scientific division of all matter into the **animal, vegetable or mineral** kingdoms would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom[.]" and, thus, could not be excepted from the grant without being destructive of it.
- ▶ **Thus, the term "minerals" "is not capable of a definition of universal application."**

"To Heavens & Inferno": Maryland (1)

Finley v. Teeter Stone Inc.:
251 Md. 428; 248 A.2d 106; 1968

- Thus, under the English Rule, the owner of the freehold was deemed to own all of the percolating waters beneath the surface of the land as he owned the soil and minerals beneath the surface of the land and the air and sky above the surface -- an application of the maxim *cujus est solum, ejus est usque ad coelum et ad inferos*.
- The English Rule is sometimes referred to as the "Absolute Ownership Rule," as the owner of the surface of the land had the absolute right to intercept underground percolating water before it left his property for whatever purpose ...

"To the Center" - Includes Minerals: W.Va. (1)

Faith v. Trinity: 745 S.E.2d 461; 2013

- The common law rule -- *cujus est solum ejus est usque ad coelum et ad inferos* -- is that a land owner with a fee simple title owns everything over the land and **under it to the center of the earth**.
- This rule extends to the minerals, be they solid (like coal), fluid or fugacious minerals (like oil and gas).**
- "To whomever the soil belongs owns also to the sky and to the depths." See *Drummond v. White Oak Fuel Co.*, 104 W.Va. 368, 375, 140 S.E. 57, 59 (1927).

"Surface Estate" - Includes What?: W.Va. (2)

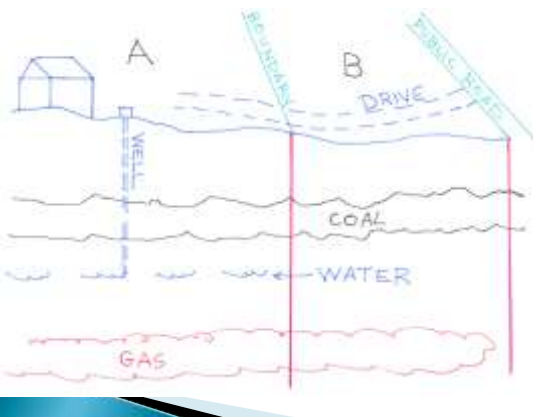
Faith v. Trinity: 745 S.E.2d 461; 2013

- We hold that the word "surface," when used in an instrument of conveyance, generally means the **exposed area of land, improvements** on the land, and **any part of the underground actually used by a surface owner** as an adjunct to surface use
- ...(for example, medium for the roots of growing plants, **groundwater, water wells**, roads, **basements, or construction footings**).
- Because Syllabus Point 1 of *Ramage* holds otherwise, it is expressly overruled.

What isn't a mineral?: Maryland (0)

Calvert Joint Venture v. Snider:
373 Md. 18; 816 A.2d 854; 2003

- There may be elements beneath the surface of land that do not constitute minerals under mineral rights laws, i.e., subterranean water, subterranean air (caverns and caves), animal life, etc.
- For this additional reason, we doubt that a "reservation" of "mineral rights" alone carries with it an estate in the entire subsurface of property.



Separate Estates Possible: West .Va. (1)

West Va. v. Cooper:
152 W. Va. 309; 162 S.E.2d 281; 1968

- That such separate estate may exist within a parcel of land is aptly stated in *13 M. J., Mines and Minerals, Section 5*, as follows:
- "Separate and distinct estates may be created** in the coal and minerals owned by different persons by separate and distinct titles. **One may own the surface, another the coal and another some other mineral, all within the same parcel of land."**

Coal vs. Gas - Indiana

Richardson v. Citizens Gas: 422 N.E.2d 704; 1981

- ▶ The owner of land is not, by virtue of his proprietorship thereof, the absolute owner of the oil and gas in and under it in its free and natural state, not yet reduced to actual control of any person ...
- ▶ The Court explained that, unlike coal, absolute title to gas and oil in place cannot pass by an instrument of conveyance "since **the utmost then can be conveyed is limited to the exclusive right to explore** the land for such gas and oil, to reduce it to possession and thereby acquire an absolute ownership."

Interpretation of Relevant Documents

Four Corners Rule : Maryland (1)

Morrison v. Brashear:

38 Md. App. 693; 382 A.2d 353; 1978

The intention of the parties must be gleaned from the instrument as a whole, i.e., the language employed, subject matter and surrounding circumstances.

In that case, decided by the Kentucky court in 1887, the grantor conveyed surface and retained minerals to part of a tract of land. In a later deed he conveyed the remainder of the 22,000 acre survey expressly deducting the parcel previously conveyed.

The court held that the interest retained in the first deed was a separate and distinct interest in a conveyance described by metes and bounds which rendered it a distinct interest from the remainder of the survey.

Presumption favors Grantee: Maryland (2)

Morrison v. Brashear:

38 Md. App. 693; 382 A.2d 353; 1978

Had Mrs. Morrison intended to exempt from the mortgage the minerals under the McDonald tract she could have done so by the use of appropriate language.

The rule that deeds should be construed against the grantor and in favor of the grantee applies with respect to the construction of an exception in a deed only when the words used are susceptible of more than one construction.

COLORADO: Four Corners Rule

McCormick v. Union Pacific 14 P.3d 346 (2000)

- ▶ We found the taking of extrinsic evidence appropriate in determining the intent of the parties and applied the rule construing reservations against the grantor and in favor of the grantee.
- ▶ ...holding that **Colorado generally follows the "four corners" principle when construing deeds...**
- ▶ **but conditionally allows extrinsic evidence in some circumstances to determine whether the deed is ambiguous**
- ▶ ...holding that reservations are construed more strictly than grants, and ambiguities are construed against the grantor

Kentucky. - Interpretation of Mining Rights (1)

Florman v. MEBCO: 207 S.W.3d 593; 2006 Ky. App.

- ▶ This rule **applies equally to a deed involving mineral rights**. In interpreting a deed, we **look to the intentions of the parties, "gathered from the four corners of the instrument"** ...using its words' common meaning and understanding.
- ▶ **We will not substitute what was intended "for what was said"**...Further, a deed shall be construed based upon its **provisions as a whole**. Since we agree with the circuit court's conclusion in this case that the terms of the Shelby/Watkins deeds granting the mineral rights were not ambiguous, we do not have to construe the terms of the deeds strongly against the preparers, whether that be the grantor or the grantees.

Kentucky. – What is a Mineral? Limestone (2) Florman v. MEBCO: 207 S.W.3d 593; 2006 Ky. App.

- ▶ The **Moodie defendants argue that the limestone and clay were part of the mineral estate** which was severed based upon the broadness of the language in the Shelby/Watkins deeds conveying **"all the minerals on and under."**
- ▶ Further, they argue that the **common ordinary meaning of the term "mineral," both in 1873 and today,** includes the terms limestone and clay and, regardless, the circuit court found by expert testimony that the **limestone and clay under and on the land has "unusual, unique and extraordinary qualities . . . thereby imparting to them 'special value.'"**

Kentucky. – What is a Mineral? Limestone (3) Florman v. MEBCO: 207 S.W.3d 593; 2006 Ky. App.

- ▶ Thus, the Moodie defendants argue that the limestone and clay also meet the legal definition of minerals because they are sought "for the purpose of profit."
- ▶ ...However, **we agree with MEBCO's argument that pursuant to the current law in Kentucky the clay and the limestone are not minerals.**

Kentucky. – What is a Mineral? Limestone (4) Florman v. MEBCO: 207 S.W.3d 593; 2006 Ky. App.

- ▶ In briefing this issue, both sides have cited various cases from several jurisdictions. However, the two cases in Kentucky that deal with whether limestone is a mineral are sufficient authority for our decision. **We begin with Rudd v. Hayden...**
- ▶ **"All minerals, coal, clays, spars, oilgases and every other kind and character of mineral cement, oil, gases, not included in the above general description, in on and under the after described land, together with the exclusive right to mine same and a right of way across said premises and ingress and egress over said land, for the purpose of operating any mine or mines and privilege of using water in their operation and in fact the full mining right and privilege in and to the following described land."**

Kentucky. – What is a Mineral? Limestone (5) Florman v. MEBCO: 207 S.W.3d 593; 2006 Ky. App.

- ▶ "It is a well-known fact, and known of course to the parties to the deed here involved, that **the section where this deed was to operate was a limestone country, where the land is everywhere underlain with limestone,** and where it crops out on practically every tract of land that is not bottom land, and where it makes its appearance in manner varying from huge cliffs, as in the case here, to small outcroppings on various parts of the land. **It is on the land everywhere,** either breaking through it, or lying under it at different depths.
- ▶ **In this country it is a part of the soil,** and a conveyance that reserves the limestone with the right to remove it **would reserve practically everything and grant nothing"**

Kentucky. – What is a Mineral? Clay (6) Florman v. MEBCO: 207 S.W.3d 593; 2006 Ky. App.

- ▶ While following Kentucky law, the Cumberland Court sought to distinguish *Kalberer*, rather than follow it, and **found that the reservation did not include clay because,** otherwise **"practically everything would be reserved and nothing granted"**
- ▶ ...In *Elkhorn City*, the Court also found that **clay was not a mineral** when it held that sandy clay loam and sandy shale were not included in the reservation of minerals.

What is a Mineral?? (General) Va. (1) Beury v. Shelton: 151 Va. 28; 144 S.E. 629; 1928

- ▶ The term "' mineral'" is **not a definite one, capable of a definition of universal application,** but is susceptible of limitation according to the...
- ▶ ...**intention of the parties using it,** and in determining its meaning regard must be had not only to the **language of the deed in which it occurs,** but also to the relative **position of the parties interested, and to the substance of the transaction** which the deed embodies.

What is a Mineral?? (General) Va. (2) Beury v. Shelton: 151 Va. 28; 144 S.E. 629; 1928

- ▶ In *Armstrong v. Lake Champlain Granite Co.*, 147 N.Y. 495, 42 N.E. 186, 49 Am. St. Rep. 683, it is said:
- ▶ 'It is plain that the owner of land who grants the minerals to another **does not use the word as synonymous with mineral substances**, because if this meaning was attached to the grant, it would amount to a grant of the whole land, as the soil and all below it would be embraced in that description.'

What is a Mineral?? (General) Va. (3) Beury v. Shelton: 151 Va. 28; 144 S.E. 629; 1928

- ▶ The learned judge writing in that case said: 'I do not deny that, if it clearly appeared to be **the intention of the parties** to be collected from the instrument, that limestone quarries should pass by the words "mines and minerals" they might pass;
- ▶ **but words are to be understood in their natural and usual meaning**, unless there be a clear indication that they are in a particular case intended to have a more or less extended signification.
- ▶ **Usually "mines" imports a cavern or subterraneous place, containing metals or minerals, and not a quarry**; and mineral means ordinarily metallic fossil bodies, and not limestone.'

What is a Mineral?? (General) Va. (4) Beury v. Shelton: 151 Va. 28; 144 S.E. 629; 1928

- ▶ 'It is thus apparent that **each case must be decided upon the language of the grant or reservation, the surrounding circumstances and the intention of the grantor**, if it can be ascertained.'
- ▶ 'It is a familiar rule of construction that the language of a grant is to be taken **most strictly against the grantor**; and further, as said in *Sult v. Hochstetter Oil Co.*, *supra*, in doubtful cases, the meaning of the word 'minerals' will be restricted to that given it by the custom of the country in which the contract is to operate.

What is a Mineral?? (General) Va. (5) Beury v. Shelton: 151 Va. 28; 144 S.E. 629; 1928

- ▶ A fair construction of the language of the reservation in the deed here involved, ...does not, in my judgment, include limestone in the reservation.
- ▶ It seems to me that the words describing the substance reserved and the words describing the removal rights are only such as are apt and proper to describe 'such minerals as are secured by the ordinary processes of mining.' **Limestone is obtained by quarrying.**
- ▶ In ordinary usage, in this section, **neither the layman nor the lawyer would think of limestone when metals and minerals are referred to.**

A two-pronged test for minerals: Colo. Mccormick v. Union Pacific: 14 P.3d 346; Colo. (2000)

- ▶ In Farrell, we held that
- ▶ (1) the word "minerals" when found in a reservation out of a grant of land means **substances exceptional in use, in value, and in character**, and **does not mean ordinary soil** which if reserved would practically nullify the grant; and
- ▶ (2) in deciding whether exceptional substances are "minerals," **the true test is what that word means in the vernacular of the mining world**, the commercial world, and landowners at the time of the grant, and whether the particular substance was so regarded as a "mineral."

California – Iron Ore not included.

Pariani v. State of California:
105 Cal. App. 3d 923; 164 Cal. Rptr. 683 (1980)

- ▶ In *Acker v. Guinn* (Tex. 1971) 464 S.W.2d 348, 352, the court adopted this approach and held that **iron ore was not included** in a grant of "oil, gas, and other minerals," inasmuch as **surface mining of iron ore would destroy the surface.**
- ▶ In *Bambauer v. Menjoulet* (1963) 214 Cal.App.2d 871 [29 Cal.Rptr. 874, 95 A.L.R.2d 839], cited by the owners, the court held that since the removal of gravel would have destroyed the surface, it was not a mineral within the mineral reservation.

Subjacent Support Surface Mining

Methods of Extraction: Virginia (1)

Phipps v. Leftwich: 216 Va. 706; 222 S.E.2d 536 (1976)

- There is uncontradicted evidence **that strip mining was unknown in Dickenson County in 1902** and that the only method of mining then recognized in the area was underground mining, such as shaft, deep, or drift mining.
- Thus, underground mining was the only kind of coal mining within the contemplation of the parties to the 1902 deed**, and,
- ...therefore, the broad language of the deed is applicable only to underground mining.**

Methods of Extraction: Virginia (2)

Phipps v. Leftwich: 216 Va. 706; 222 S.E.2d 536 (1976)

- It is generally held in other jurisdictions** that the owner of the mineral estate will not be permitted to destroy the surface without liability, even when open pit mining was contemplated, **unless the owner of the surface estate has clearly waived his right to subjacent support.**
- Smith v. Moore, 172 Colo.** 440, 474 P.2d 794 (1970); **Benton v. U.S. Manganese Corporation, 229 Ark.** 181, 313 S.W.2d 839 (1958); **Campbell v. Campbell, 29 Tenn.** App. 651, 199 S.W.2d 931 (1946).

Intent and Strip Mining: Maryland (1)

Dept. of Forests v. Georges Creek Coal: 250 Md. 125; 242 A.2d 165; 1968

- "Excepting, however, from the operation of this deed, and reserving to the George's Creek Coal Company, Incorporated, its successors and assigns, all the coal, clay and other minerals, and all the oil and gas underlying said land hereby conveyed, together with the right to enter in, upon and under said land and to mine, excavate and remove all said coal, clay and other minerals,...*
- all without being in any manner liable for the breaking or subsidence of the surface of said land or for any injury or damage done to the overlying surface thereby*

Intent and Strip Mining: Maryland (2)

Dept. of Forests v. Georges Creek Coal: 250 Md. 125; 242 A.2d 165; 1968

- Both parties agree that if the language of a deed be doubtful, it shall be most strongly construed against the grantor, but as said in ***Zittle v. Weller, 63 Md. 190, 196,***
- 'this rule is to be resorted to, and relied on, only where all other rules of exposition fail to reach, with reasonable certainty, the intention of the parties.'
- Therefore, we shall take a look at the evidence in the record and perhaps from our consideration of it there will emerge what the parties to the 1931 deed intended in respect of strip mining.

Background Information: Maryland (3)

Dept. of Forests v. Georges Creek Coal: 250 Md. 125; 242 A.2d 165; 1968

- It is important to remember that the Company had owned the land, in fee simple, for over 20 years before the deed to McMillen.
- It was rocky, remote, mountainous, unimproved, and generally inaccessible. Agriculture was impossible.
- But there was timber and, as was well known in that area, timber was McMillen's business.

Sequence of Conveyances: Maryland (4)

Dept. of Forests v. Georges Creek Coal:
250 Md. 125; 242 A.2d 165; 1968

- ▶ In February 1937, having "clearcut" all of the timber, McMillen conveyed, subject to the exception and reservation of record, approximately 5800 acres of the tract to the United States for about \$ 1.00 per acre.
- ▶ In December 1954 the United States sold the 5800 acres, along with other land in Garrett County, to the State of Maryland. It is now part of the Savage River State Forest.

Surrounding Circumstances: Maryland (5)

Dept. of Forests v. Georges Creek Coal:
250 Md. 125; 242 A.2d 165; 1968

- ▶ F. R. Zacher, a mining engineer, testified there is beneath the surface of about one-half of the property 7,371,000 tons of bituminous (soft) coal.
- ▶ Mr. Zacher testified that the stripped area would total about 409 acres and that an additional 250 acres would be disturbed. The strips, of course, are not contiguous. They follow the coal seams.
- ▶ He also said strip mining had been known for "in excess of sixty years."

Analysis of the Language: Maryland (6)

Dept. of Forests v. Georges Creek Coal:
250 Md. 125; 242 A.2d 165; 1968

- ▶ A close reading of the language used in the deed ought, per se, to banish any notion that McMillen had plans for the land, other than logging. Had he any such plans his acquiescence in the reservation of such broad and unrestricted rights by the grantor would be difficult, if not impossible, to understand.
- ▶ There is also reserved the right "to do any and all things necessary or convenient for the mining and removing" of the coal.

Circumstances at the time: Maryland (7)

Dept. of Forests v. Georges Creek Coal:
250 Md. 125; 242 A.2d 165; 1968

- ▶ The State does not contend that the language of the Company's exception and reservation forbids deep mining or auger mining yet neither of these methods is mentioned ...
- ▶ ...The Company was certainly aware (as was McMillen, we think) of the fact that strip mining was a widely known and well understood method of recovering coal.
- ▶ In fact, the Company had participated in the strip mining operations between Lonaconing and Barton in 1918.
- ▶ While the question here presented is new to us, it has been a source of litigation in other states ...

Conclusion: Maryland (8)

Dept. of Forests v. Georges Creek Coal:
250 Md. 125; 242 A.2d 165; 1968

- ▶ However desirable it may be for contracting parties, in the future, to be more specific, ...
- ▶ ...we think any reasonable appraisal of the circumstances, attending in 1931, makes it entirely clear that the Company and McMillen had no notion whatever of excluding strip mining as a method of removing the coal.

Surface Mining ?? Colorado (1)

Smith v. Moore: 474 P.2d 794 (1970)

- ▶ **Focusing on 1946, it is clear that there had never been strip mining for coal in Gunnison County** and that...
- ▶ ...coal had been removed from the Baldwin Mine for **more than forty years by the underground mining method**. Coal was being extracted from an area where the **over-burden was up to 500 feet thick** which would have made strip mining operations uneconomical according to the testimony at the trial.

Surface Mining ?? Colorado (2)

Smith v. Moore: 474 P.2d 794 (1970)

- ▶ The circumstances surrounding the time when the deed was executed strongly militate against the existence of any contemplation that strip mining would be necessary and that extensive destruction of the surface might be authorized without compensation.
- ▶ We cannot say that the language reserving enough of the surface as may be necessary for the proper working of the minerals is sufficient in clarity and certainty to qualify as a reservation of a right to destroy the surface by strip mining.

Lateral v. Subjacent Support: Maryland (1)

Finley v. Teter Stone Inc.:

251 Md. 428; 248 A.2d 106; 1968

- ▶ In considering the cases relied on by the Finleys, it is important to keep in mind the distinction between lateral support and subjacent support.
- ▶ "Lateral support" is "the right which soil in its natural state has to support from land adjoining it."
- ▶ "Subjacent support," on the other hand, is "the support of the surface by the underlying strata of the earth"
- ▶ The evidence established that the sink holes on the Finley land resulted from the downward movement of the earth. There was no sideways movement of soil or rock from the Finley land into the Teeter quarry.

Rights of Support: West .Va. (1)

Winnings v. Wilpen : 134 W. Va. 387; 59 S.E.2d 655; 1950

- ▶ Court held that a conveyance of the coal and all minerals with the right to mine and remove "the said coal and all minerals from said land",...
- ▶ ...did not extinguish the right of the grantor to subjacent support for the protection of the surface of the land in its natural state in the event of the removal of the coal.
- ▶ The well recognized and firmly established rule is that when a landowner has conveyed the minerals underlying the surface of his land, he retains the right to the support of the surface in its natural state unless it clearly appears, by express words or by necessary implication, that he has released, waived, or qualified his right to such support.

COLORADO: Subjacent Support (1)

Russell Coal Co. v. County Board of Commissioners

129 Colo. 330; 270 P.2d 772; 1954

- ▶ In Colorado, when a separation of the surface rights from mineral rights has occurred, in the absence of an express agreement otherwise, the duty of mineral estate is bound to support the surface.
- ▶ Our cases supporting this rule concern the rights between private persons; however, it seems logical that this rule should apply with greater force where the surface is acquired or taken by a governmental agency for a public highway,

COLORADO: Subjacent Support (2)

Russell Coal Co. v. County Board of Commissioners

129 Colo. 330; 270 P.2d 772; 1954

- ▶ When land is acquired by condemnation for a highway, the condemner acquires not only what is understandably known as just the surface, but, by virtue of such condemnation, it acquires whatever is necessary for the support of that surface, and that is according to the primary intention of the legislature in enacting the condemnation laws.

Subjacent Support : Maryland (1)

Piedmont & Georges Creek v. Kearney:

114 Md. 496; 79 A. 1013; 1911

- ▶ *"The parties of the first part reserve to themselves, their heirs and assigns, all coal and other minerals that have been or may hereafter be found on or in the said lands, together with the right to mine and remove the said coal or minerals at such place or places as may appear to them, the said first parties, their heirs or assigns, most suitable and convenient by tramroad, plane and dump houses or otherwise,"*

Subjacent Support : Maryland (2)
Piedmont & Georges Creek v. Kearney:
 114 Md. 496; 79 A. 1013; 1911

- ▶ ...the first time this Court has been called upon to pass on the doctrine of subjacent support, where the surface and subjacent estates are owned by different persons.
- ▶ The general rule of law is that when the estate in minerals "in place," as they are sometimes spoken of in their natural bed, is severed from the estate in the surface,
- ▶ the owner of the latter has an undoubted right of subjacent support for the surface, and the owner of the estate in the minerals is entitled to remove only so much of them as he can take without injury to the surface, unless otherwise authorized by contract or statute.

Right can be modified: Maryland (3)
Piedmont & Georges Creek v. Kearney:
 114 Md. 496; 79 A. 1013; 1911

- ▶ Although the rule has been so generally adopted, the parties can modify it or avoid its application by inserting provisions in the grants or leases ...
- ▶ ...in many of the cases which have been before the Courts, the question has been whether that was done by the particular provisions, and, if so, to what extent.
- ▶ There are many decisions in which provisions very similar to these have been held not to be sufficient to relieve the owners of the minerals of their duty to support the surface.

Right can be modified: Maryland (4)
Piedmont & Georges Creek v. Kearney:
 114 Md. 496; 79 A. 1013; 1911

- ▶ When the doctrine or right of subjacent support is recognized, as it is with practical unanimity by the authorities, it seems to us to be far better to require those who desire to enter into stipulations by which the one party to the transaction is to part with the right which the law gives him, and the other is to be relieved of a duty which the law imposes upon him, to use language that will necessarily import or clearly express such intention.
- ▶ It should be either by express words or necessary implication...

Description of the site: Maryland (5)
Piedmont & Georges Creek v. Kearney:
 114 Md. 496; 79 A. 1013; 1911

- ▶ The testimony shows that the depth of the cover was three hundred and fifty or four hundred feet, and it was admitted at the opening of the case that "all the coal to a depth of six feet under the plaintiff's property was removed by the defendant company after the year 1906, and that no stumps or pillars were left, and that this was done before the injuries to the surface."

Percolating Water: Maryland (6)
Piedmont & Georges Creek v. Kearney:
 114 Md. 496; 79 A. 1013; 1911

- ▶ The rule is well established that the owner of the coal is not liable to the owner of the surface for injuries resulting from the diversion of what are spoken of as hidden streams, caused merely by the removal of the coal.
- ▶ In *Coleman v. Chadwick*, 80 Pa. 81, relied on by the appellant, the Court said: "So far as we can judge from the record, the loss of the plaintiff's springs was occasioned by the ordinary operation of mining, and would have occurred though no part of the surface had been broken.

Description of the site: Maryland (7)
Piedmont & Georges Creek v. Kearney:
 114 Md. 496; 79 A. 1013; 1911

- ▶ Mining must interfere, more or less, with those subterranean streams and percolations of water which appear upon the surface as springs; ...
- ▶ ...to say that the owner of the substrata shall be accountable in damage for their disturbance, is to say that he shall have no use whatever of his minerals, for, without interfering to some extent with such waters, mining is impossible."
- ▶ That seems to us to be a very sensible and necessary rule to adopt.

Kentucky. – Right of Subjacent Support (1)
 Karst-Robbins v. Arch of Kentucky:
 964 S.W.2d 419; 1997

- ▶ In *Buchanan v. Watson, Ky., 290 S.W.2d 40 (1956)*, overruled, *Akers v. Baldwin, 736 S.W.2d 294 (1987)*, and *Ward v. Harding, 860 S.W.2d 280 (1993)*, **the court reaffirmed earlier rulings by holding that coal underlying a tract of land may be removed by a mineral owner by means of a strip mining method** which results in the destruction of the surface owned by another, and the **mineral owner is not liable to the surface owner for damages** for the destroyed surface rights **unless** the right to mine the coal was exercised arbitrarily, wantonly or maliciously.

Kentucky. – Right of Subjacent Support (2)
 Karst-Robbins v. Arch of Kentucky:
 964 S.W.2d 419; 1997

- ▶ **The Buchanan rule continued to be the law of Kentucky until *Akers v. Baldwin, Ky., 736 S.W.2d 294 (1987)*, wherein Buchanan was overruled to the extent that it deprived surface owners of the right to recover damages for the destruction of surface rights as a result of strip mining.**
- ▶ **Moreover, *Akers* also declared that KRS 381.940, which was passed in response to Buchanan and which in effect prevented all strip mining under broad form deeds, was unconstitutional.**

Kentucky. – Right of Subjacent Support (3)
 Karst-Robbins v. Arch of Kentucky:
 964 S.W.2d 419; 1997

- ▶ The **Supreme Court found that the statute both violated the separation of powers principle, and impermissibly impaired the obligations of existing contracts**, i.e., **broad form deeds**.
- ▶ However, the Supreme Court reaffirmed Buchanan insofar as it **upheld a mineral owner's right to extract minerals by strip mining**, and the court declined to consider whether the statute either deprived mineral owners of due process, and/or effected a taking of property without the payment of just compensation.

Kentucky. – Right of Subjacent Support (4)
 Karst-Robbins v. Arch of Kentucky:
 964 S.W.2d 419; 1997

- ▶ **Undaunted, and in response to the *Akers* declaration that KRS 381.940 was unconstitutional, the legislature proposed the adoption of Section 19(2) as a constitutional amendment to the Kentucky Bill of Rights.**
- ▶ This amendment, which **was ratified by the voters during the November 1988 general election** and which is **essentially identical to KRS 381.940**, states as follows:

Kentucky. – Right of Subjacent Support (5)
 Karst-Robbins v. Arch of Kentucky:
 964 S.W.2d 419; 1997

- ▶ In any instrument ***heretofore or hereafter*** executed purporting to sever the surface and mineral estates or to grant a mineral estate or to grant a right to extract minerals, which ***fails to state or describe in express and specific terms the method of coal extraction to be employed, or where said instrument contains language subordinating the surface estate to the mineral estate, it shall be held, in the absence of clear and convincing evidence to the contrary, ...***

Kentucky. – Right of Subjacent Support (6)
 Karst-Robbins v. Arch of Kentucky:
 964 S.W.2d 419; 1997

- ▶ ...that the ***intention of the parties*** to the instrument was that the coal be ***extracted only by the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed***, and that the mineral estate be dominant to the surface estate for the purposes of coal extraction by only the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed.

Kentucky. – Right of Subjacent Support (7)

Karst-Robbins v. Arch of Kentucky:
964 S.W.2d 419; 1997

- ▶ Section 19(2) was held to be constitutional some five years later in *Ward v. Harding*.
- ▶ Further, **the Supreme Court** in *Ward* **overruled both Buchanan and Akers, holding that "broad form" mineral severance deeds would no longer be construed as including the right to strip mine.** Hence, the owner of a mineral estate thereafter could not use strip mining methods to extract minerals without the surface owner's consent, unless there was clear and convincing evidence that regardless of when the original severance deed was executed, the parties thereto intended to permit recovery of the minerals by such strip mining methods.

Adverse Claims Underground

Adverse claims of Minerals: West Va.

Central Trust Co. v. Harless:
108 W. Va. 618; 152 S.E. 209; 1930

- ▶ where there has been **a severance of the surface and the minerals, the possession of such surface is not possession of the minerals.**
- ▶ ... said in effect that minerals under the surface are not susceptible of actual possession. **To have actual possession they must be mined.**

Adverse Possession – Mineral Rights Va.

Mountain Mission School, Inc. v. Buchanan Realty
207 Va. 518; 151 S.E.2d 403; 1966

- ▶ The ownership of the surface of the land by Mountain Mission, while undisputed, was a mere possession of the surface only. **It did not constitute possession of the mineral estate which had been severed from the surface.** In order for the possession to be considered adverse, there must have been actual commercial mining of the coal, and there is no evidence that there ever had been such mining in connection with the land involved.

Workin' in a Coal Mine...Indiana:

McBeth v. Wetnight: 57 Ind. App. 47; 106 N.E. 407; 1914

- ▶ We are aware, as appellants contend, **that actual possession of a coal right does not require that one shall live in the coal mine.** On the contrary, possession is not to be confused with residence.
- ▶ "The claimant's possession and its continuity, will be sufficient if by his acts and conduct it is apparent to men of ordinary prudence that he is **asserting and exercising ownership over the property**; and for this purpose it is necessary to take into consideration the **nature, character, and location of the property, and the uses for which it is fitted, or to which it has been put.**"

Claim Underground: Indiana quotes Pa.(1)

Marengo Cave Co. v. Ross:

212 Ind. 624; 10 N.E.2d 917; 1937

- ▶ "The title of the plaintiff extends from the surface to the center, but actual possession is confined to the surface. **Upon the surface he must be held to know all that the most careful observation by himself and his employees could reveal, unless his ignorance is induced by the fraudulent conduct of the wrongdoer.**
- ▶ But in the coal veins deep down in the earth he cannot see. **Neither in person nor by his servants nor employees can he explore their recesses in search for an intruder.** If an adjoining owner goes beyond his own boundaries in the course of his mining operations the owner on whom he enters has no means of knowledge within his reach.

Claim Underground: Indiana quotes Pa.(2)

Marengo Cave Co. v. Ross:
212 Ind. 624; 10 N.E.2d 917; 1937

- ▶ ...Nothing short of an accurate survey of the interior of his neighbor's mines would enable him to ascertain the fact. **This would require the services of a competent mining engineer and his assistants, inside the mines of another, which he would have no right to insist upon.**
- ▶ To require an owner under such circumstances to take notice of a trespass upon his underlying coal at the time it takes place is to require an impossibility; and to hold that the statute begins to run at the date of the trespass is in most cases to take away the remedy of the injured party before he can know that an injury has been done him. **A result so absurd and so unjust ought not to be possible**

Claim Underground: Indiana quotes Pa.(3)

Marengo Cave Co. v. Ross:
212 Ind. 624; 10 N.E.2d 917; 1937

- ▶ "If there is **no severance** an entry upon the **surface will extend downward** and draw to it a title to the underlying minerals; so that he who disseizes another and acquires title by the statute of limitation will succeed to the estate of him upon whose possession he has entered." *Pres. & Mgrs. of the Delaware & Hudson Canal Company v. Hughes et al. (1897), 183 Pa. 66, 73, 38 A. 568, 63 Am. St. Rep. 743.*

Kentucky. – Cave Rights (1)

Edwards v. Sims: 232 Ky. 791; 24 S.W.2d 619; 1929

- ▶ The reader will find of interest the address on "*The Legal Story of Mammoth Cave*" by Hon. John B. Rodes, of Bowling Green, before the 1929 Session of the Kentucky State Bar Association, published in its proceedings. *In Cox v. Colossal Cavern Co., 210 Ky. 612, 276 S.W. 540*, the subject of cave rights was considered, and this court held
- ▶ **...there may be a severance of the estate in the property, that is, that one may own the surface and another the cave rights,** the conditions being quite **similar to but not exactly like those of mineral lands.** But there is no such severance involved in this case, as it appears that the defendants are the owners of the land and have in it an absolute right.

Kentucky. – Cave Rights (2)

Edwards v. Sims: 232 Ky. 791; 24 S.W.2d 619; 1929

- ▶ ***Cujus est solum, ejus est usque ad coelum ad infernos*** (to whomsoever the soil belongs, **he owns also to the sky and to the depths**), is an old maxim and rule. It is that the owner of realty, unless there has been a division of the estate, is entitled to the free and unfettered control of his own land above, upon and beneath the surface. **So whatever is in a direct line between the surface of the land and the center of the earth** belongs to the owner of the surface. Ordinarily that ownership cannot be interfered with or infringed by third persons... There are, however, certain limitations on the right of enjoyment of possession of all property, such as its use to the detriment or interference with a neighbor and burdens which it must bear in common with property of a like kind.

Underground Utilities and Trespass

Underground Trespass: New Jersey (1)

Diamond v. NJ Bell: 51 N.J. 594; 242 A.2d 622; 1968

- ▶ In 1957, defendant Bell Telephone Company installed an underground conduit on plaintiffs' property in Morristown.
- ▶ The conduit was installed over plaintiffs' sewer line and, allegedly, the work was performed in such a negligent manner as to break the "clean-outs" on the sewer line.
- ▶ As a result, sediment gradually accumulated in the line until, on February 1, 1966, a back-up occurred and plaintiffs' property was flooded.
- ▶ Until that moment, plaintiffs had been unaware of any damage or malfunction in the sewer line.

Traditional Rule: New Jersey (2)

Diamond v. NJ Bell: 51 N.J. 594; 242 A.2d 622; 1968

- ▶ Traditionally, "a plaintiff's cause of action accrues for limitation purposes when he suffers actual consequential damage or loss from the defendant's negligence."
- ▶ Where the plaintiffs' only injuries here those flood damages resulting from the sewer back-up, their claim might well fall within this "actual damages" doctrine.
- ▶ The back-up did not occur until 1966 and the negligence suit was filed in that same year.
- ▶ ...it became evident that plaintiffs' damages consist primarily of the costs of repairing the broken sewer "clean-outs" -- harm sustained upon the installation of the underground conduit in 1957.

Underground Trespass: New Jersey (3)

Diamond v. NJ Bell: 51 N.J. 594; 242 A.2d 622; 1968

- ▶ We must, therefore, consider the applicability of the recently evolved discovery rule.
- ▶ Under that doctrine, a cause of action accrues only when the plaintiff knows or should reasonably know of his injury.
- ▶ In that manner he is relieved of the impossible task of asserting a claim before its existence may reasonably be known to him.

Brings in Mining Law: New Jersey (4)

Diamond v. NJ Bell: 51 N.J. 594; 242 A.2d 622; 1968

- ▶ Many courts have recognized the obvious inequity of allowing a limitations period to expire while actionable harm is hidden beneath the surface of the earth, unascertainable either by ordinary observation or by special alertness on the part of a landowner.
- ▶ In the early case of Lewey v. H.C. Frick Coke Co., 166 Pa. 536, 31 A. 261 (1895), defendants had tunneled deep under the plaintiff's adjacent property and removed 4,000 bushels of coal. Eleven years later plaintiff first became aware of the trespass and sued for damages.

Brings in Mining Law: New Jersey (5)

Diamond v. NJ Bell: 51 N.J. 594; 242 A.2d 622; 1968

- ▶ The underlying principle, that a cause of action for underground harm not susceptible to observation does not accrue until the harm can reasonably be ascertained, is equally valid in this jurisdiction.
- ▶ That this is not a mining area only ensures that this factual complex requiring application of the discovery rule is likely to recur infrequently.
- ▶ Moreover, we reject any theoretical distinctions based on totally secretive operations or active concealment by defendants in the mining cases.
- ▶ As the Lewey decision illustrates, it is not these considerations, but rather the helpless position of plaintiffs, which dictate application of a discovery rule

Brings in Mining Law: New Jersey (6)

Diamond v. NJ Bell: 51 N.J. 594; 242 A.2d 622; 1968

- ▶ We are in agreement with the above decisions holding that to permit the running of the limitations period while a plaintiff's injury is hidden from observation beneath the ground would be overly harsh and unjust. We accordingly hold that the discovery rule extends where, as here, the location of the negligent conduct and resultant harm beneath the surface of the earth prevents the injured party from immediately ascertaining the harm inflicted.

Sewer Line Dispute: Maryland (1)

Mitchell v. Houstle: 217 Md. 259; 142 A.2d 556; 1958

- ▶ Both properties were from 1916 until 1947 part of a larger tract under unified ownership.
- ▶ In 1947, the property was divided approximately in half, with the southern portion passing by mesne conveyances to the appellants (Mitchells) and the northern portion, also by mesne conveyances, to the appellees, (Houstles).
- ▶ The lots slope sharply downward to the north, and as a result the sewer line was laid in the bottom of Sulgrave Avenue.

Was quasi-easement Apparent?: Maryland (2) Mitchell v. Houstle: 217 Md. 259; 142 A.2d 556; 1958

- ▶ The first question for our determination is whether, at the time of this conveyance, an easement was created.
- ▶ ...then be required to answer the further question of whether the easement inured to the benefit of the present owners, the Mitchells. The appellants contend that an implied easement was created for the benefit of the property they now own ...
- ▶ ...They argue that ... it was "visible" as there were two clean-out fittings located on the Houstle lot that extended from 6 to 8 inches above the ground.



Was quasi-easement Apparent?: Maryland (3) Mitchell v. Houstle: 217 Md. 259; 142 A.2d 556; 1958

- ▶ The appellants claim further that the appellees were put on notice of said easement by the Plumbing Code of Baltimore City which required clean-outs every 100 feet, the original application with reference to the sewerage for the appellants' property which was in the health department, and also by a statement made by a spectator when the appellees purchased, at public auction in 1956, their portion of the property.
- ▶ The appellees contend that their property is not subject to any implied easement and that they had no notice, actual or constructive, concerning the fact that the sewer line had been laid under their property.



Implied Grant v. Reservation: Maryland (4) Mitchell v. Houstle: 217 Md. 259; 142 A.2d 556; 1958

- ▶ From a very early date, a distinction has been made between an implied grant and an implied reservation, with the rule being much more strict when called upon to create an easement by implied reservation than to create one by implied grant. *Slear v. Jankiewicz, 189 Md. 18, 22.*
- ▶ In that case Judge Markell, speaking for the Court, at page 23, said:



Implied Grant v. Reservation: Maryland (5) Mitchell v. Houstle: 217 Md. 259; 142 A.2d 556; 1958

- ▶ "But if during unity of ownership the owner of two properties uses one for the benefit of the other in such manner as would indicate existence of an easement if the properties were owned by different persons, 'then, upon a conveyance of the [dominant] property so used an easement will be granted to the purchaser, provided the use has been such that the easement resulting from it would be of the class known as continuous and apparent, and would be necessary for the reasonable enjoyment of the property conveyed.'"



Was quasi-easement Apparent?: Maryland (6) Mitchell v. Houstle: 217 Md. 259; 142 A.2d 556; 1958

- ▶ There are at least two good reasons to support the rule that one of the necessary characteristics of a quasi easement, which is to ripen into an easement by implication and pass with a conveyance of the dominant estate, is that it be "apparent."
- ▶ First, the basis of an implied easement is the implied intention of the parties that an easement be created; if the easement be not apparent, it could hardly form the basis for an implied intention to grant the same.



Was quasi-easement Apparent?: Maryland (7) Mitchell v. Houstle: 217 Md. 259; 142 A.2d 556; 1958

- ▶ Second, if such a quasi easement be not visible, it would not come to the knowledge of a prospective purchaser of either the dominant or servient estate, ...
- ▶ ...and if an innocent purchaser of a servient estate were required to accept his title subject to easements that were not apparent, ...
- ▶ ...it would create chaos in the field of land purchases, and work hardships never contemplated by the law.



Was quasi-easement Apparent?: Maryland (8) Mitchell v. Houstle: 217 Md. 259; 142 A.2d 556; 1958

- ▶ The only evidence in the present case with reference to the alleged easement being "apparent" was that there were two clean-out pipes from the sewer pipe across the appellees' property that were about five inches in diameter and extended out of the ground eight to ten inches. The appellees contended the lot was completely covered by weeds and brush, and they did [*266] not discover the clean-out pipes until after their purchase of the property.
- ▶ The chancellor found that the claimed easement was not "apparent," and we see no good reason to disturb his decision.

Was quasi-easement Apparent?: Maryland (9) Mitchell v. Houstle: 217 Md. 259; 142 A.2d 556; 1958

- ▶ ...appellants further contend that the appellees ...were chargeable with knowledge of the Plumbing Regulations of Baltimore City that require clean-out pipes "every so many feet."
- ▶ ...the chancellor found as a matter of fact that they did not have actual knowledge thereof, and in this finding we are unable to say he was clearly in error; ...
- ▶ ...nor do we know of any statute that provides that the Plumbing Regulations of Baltimore City shall be constructive notice of their provisions.

NEW MEXICO: Subterranean Trespass: (1) Hartman v. Texaco: 937 P.2d 979; 1997 N.M. App.

- ▶ Hartman also argues that under common law a trespass could occur beneath the surface of the land, and therefore this Court should interpret *Section 30-14-1.1(D)* in a manner consistent with the common law. **We recognize that in New Mexico an action for common law trespass does provide relief for trespass beneath the surface of the land.** See *Schwartzman Inc. v. Atchison, Topeka & S.F. Ry.*, 857 F. Supp. 838, 844 (D.N.M. 1994)
- ▶ (trespass for pollution of groundwater); see also *Lincoln Lucky & Lee Mining Co. v. Hendry*, 9 N.M. 149, 155, 50 P. 330, 332 (1897) (subsurface trespass by mining shaft).

NEW MEXICO: Subterranean Trespass: (2) Hartman v. Texaco: 937 P.2d 979; 1997 N.M. App.

- ▶ Rather than limiting or abolishing a right that existed under the common law, **Section 30-14-1.1(D) provides an additional remedy** in certain statutorily defined circumstances. Those circumstances are not necessarily as expansive as the full reach of the common law. The legislature in its wisdom may focus on only certain kinds of trespass for purposes of enhancing damages.

Access to Minerals

COLORADO: Easement by Necessity (1) Thompson v. Whinnery: 895 P.2d 537 (1995)

- ▶ An implied easement of necessity for access to land arises when the **owner of a tract of land conveys part of that tract to another, leaving either the part conveyed or the part retained without access except over the other part.** *Wagner v. Fairlamb*, 151 Colo. 481, 486, 379 P.2d 165, 168 (1963)
- ▶ In such circumstances an easement is implied because "the law assumes that **no person intends to render property conveyed inaccessible** for the purpose for which it was granted [or retained]."
- ▶ This assumed intent has its roots in considerations of public policy that militate against rendering a tract of land useless for lack of access.

COLORADO: Easement by Necessity (2)

Thompson v. Whinnery: 895 P.2d 537 (1995)

- ▶ To establish an implied easement of necessity for access to land, three requirements must be met:
- ▶ (1) there must be **unity of ownership** of the entire tract prior to division;
- ▶ (2) the **necessity** for the easement **must exist at the time of severance**; and
- ▶ (3) the necessity for the particular easement **must be great**.
- ▶ The burden of proving the existence of an implied easement of necessity is upon the person claiming the easement.

COLORADO: Implied Access

Rocky Mtn. Fuel Co. v. Helfin:
148 Colo. 415; 366 P.2d 577; 1961

- ▶ **The owner of a mineral estate** has rights of **ingress, egress, exploration, and surface usage** as are **reasonably necessary** to the successful exploitation of his interest. *Jilek, et al v. Chicago, Wilmington & Franklin Coal Co.*, 382 Ill. 241, 47 N.E. (2d) 96; *Miller v. Ridgley*, 2 Ill. (2d) 223, 117 N.E. (2d) 759.
- ▶ These rights were recognized by the trial court in its decree. However, such an owner has **no right to destroy the surface**. *Barker v. Mintz*, 73 Colo. 262, 215 Pac. 534.

COLORADO: Implied Access (1)

Gerrity Oil v. Magness: 946 P.2d 913; 1997 Colo.

- ▶ **Severed mineral rights lack value unless they can be developed.** For this reason, the owner of a severed mineral estate or lessee is privileged to access the surface and **"use that portion of the surface estate that is reasonably necessary** to develop the severed mineral interest." ...the severed mineral owner's right of access includes the **"rights of ingress, egress, exploration, and surface usage as are reasonably necessary** to the successful exploitation of [the mineral] interest."
- ▶ The right to use the surface as is reasonably necessary, known as the **rule of reasonable surface use**, does not include the right to destroy, interfere with or damage the surface owner's correlative rights to the surface.

COLORADO: Implied Access (2)

Gerrity Oil v. Magness: 946 P.2d 913; 1997 Colo.

- ▶ In this sense, the **right of access to the mineral estate is in the nature of an implied easement**, since it entitles the holder to a limited right to use the land in order to reach and extract the minerals.
- ▶ **...In the absence of relevant lease provisions**, "it has been held that such surface easements are implied as will permit the lessee or mineral owner to enjoy the interest conveyed."
- ▶ ... As the owner of property subject to the easement, the **surface owner "continues to enjoy all the rights and benefits of proprietorship** consistent with the burden of the easement."

COLORADO: Implied Access (3)

Gerrity Oil v. Magness: 946 P.2d 913; 1997 Colo.

- ▶ The fact that **neither the surface owner nor the severed mineral rights holder has any absolute right to exclude the other** from the surface **may create tension** between competing surface uses. "The broad principle by which these tensions are to be resolved is that **each owner must have due regard for the rights of the other** in making use of the estate in question."
- ▶ How much accommodation is necessary will, of course, **vary depending on surface uses and on the alternatives available** to the mineral rights holder for exploitation of the underlying mineral estate.

Kentucky. – Implied access (1)

Akers v. Baldwin: 736 S.W.2d 294; 1987

- ▶ I agree that the sale of mineral rights by deed of severance from the surface carries with it the right to remove the mineral. This was the holding in *Buchanan v. Watson, Ky.*, 290 S.W.2d 40 (1956), and in such earlier cases as *Himler Coal Company v. Kirk, Ky.*, 205 Ky. 666, 266 S.W. 355 (1924).
- ▶ **There is an implied right, as a matter of necessity, to remove that which has been purchased**, even when the document of sale does not expressly create such a right

Kentucky. – Implied access (2)

Akers v. Baldwin: 736 S.W.2d 294; 1987

- ▶ Although the **sale of the coal necessarily carries with it the implied right to remove the coal**, it does not follow that the surface owner can be damaged with impunity without liability.
- ▶ In the underground mine cases, **the mineral owner, as a matter of necessity, had the right to open a shaft to get to the coal and the right to necessary easements across the surface to transport the coal after it had been mined.**
- ▶ These **were only such rights as were absolutely necessary**, and liability did attach for damage to the surface that was not strictly necessary.

Calvert Joint Venture v. Snider Maryland Case Study

Subjacent Support: Maryland (1)

Calvert Joint Venture v. Snider:
373 Md. 18; 816 A.2d 854; 2003

- ▶ In reference to petitioner's first question in its Petition for Certiorari, we hold that an owner of mineral rights owes a duty of support to the surface land.
- ▶ We, however, do not perceive that this issue is relevant in this case

Right of Access – Minerals: Maryland (2)

Calvert Joint Venture v. Snider:
373 Md. 18; 816 A.2d 854; 2003

- ▶ The focus of the appeal leads this Court to an issue that we have yet to directly resolve: the implied reservation, if any, of an owner of subsurface mineral rights to enter and use the surface of the property to prospect for and/or gain access to those minerals.
- ▶ We hold, that while, generally, such an implied easement by reservation may be found to exist,

Right of Access – Minerals: Maryland (3)

Calvert Joint Venture v. Snider:
373 Md. 18; 816 A.2d 854; 2003

- ▶ ...where respondents reserved mineral rights without language allowing them ingress/egress access to the surface of the land, ...
- ▶ ...knowing the land was to be used as a residential subdivision, and at the time of the conveyance, respondents owned adjacent property from which they might exercise their right to any minerals under the Calvert Property, ...
- ▶ ...no easement, implied or otherwise, exists to use the surface of the Calvert Property to explore for or extract the minerals underneath said property.

Intent of Mineral Conveyance: Maryland (4)

Calvert Joint Venture v. Snider:
373 Md. 18; 816 A.2d 854; 2003

- ▶ This Court has very recently set out the standard for construing deeds
- ▶ "The case law setting forth the general rules of construction of deeds affirms that, 'the court should take into consideration the language employed, the subject matter, and surrounding circumstances,' essentially the deed as a whole.
- ▶ Likewise, there is an equal abundance of Maryland case law directing the Court to strongly consider the intention of the parties."

Intent of Mineral Conveyance: Maryland (5)

Calvert Joint Venture v. Snider:

373 Md. 18; 816 A.2d 854; 2003

- ▶ "In construing a deed, we apply the principles of contract interpretation.
- ▶ These principles require consideration of "the character of the contract, its purpose, and the facts and circumstances of the parties at the time of execution,"
- ▶ It is a cardinal rule in the construction of deeds that "the intention of the parties, to be ascertained from the whole contents of the instrument, must prevail unless it violates some principle of law.

Implied grant vs. reservation: Maryland (6)

Calvert Joint Venture v. Snider:

373 Md. 18; 816 A.2d 854; 2003

- ▶ An implied easement is based on the presumed intention of the parties at the time of the grant or reservation as disclosed from the surrounding circumstances rather than on the language of the deed.

Implied grant vs. reservation: Maryland (7)

Calvert Joint Venture v. Snider:

373 Md. 18; 816 A.2d 854; 2003

- ▶ ...if the grantor intends to reserve any right over the tenement granted it is his duty to reserve it expressly in the grant, and to this the only exception is of ways or easements of necessity.
- ▶ Both these general rules are founded upon the maxim that 'a grantor shall not derogate from his grant...
- ▶ By these recent decisions the doctrine of implied reservation in such cases of all such easements as are mentioned in the first proposition, is utterly repudiated...

Exception vs. reservation: Maryland (8)

Calvert Joint Venture v. Snider:

373 Md. 18; 816 A.2d 854; 2003

- ▶ "...exceptions," generally, relate to a physical part of property being "excepted" from the grant
- ▶ A "reservation" generally relates to a right reserved to the grantor permitting the grantor to exercise some act upon the property conveyed.
- ▶ Over time the terms have often been used interchangeably – but technically they are different.
- ▶ The language ...creates a reservation, a right, but does not "except" subsurface property from the grant.
- ▶ Accordingly, the entire property is conveyed, subject to the right retained by the grantor to extract minerals.

Minerals – First Impression: Maryland (9)

Calvert Joint Venture v. Snider:

373 Md. 18; 816 A.2d 854; 2003

- ▶ Because this Court has never specifically addressed many of the issues stemming from the separation of the mineral rights from an estate, we also look to the law from our sister states, as well as our own case law regarding subjacent support rights, in ascertaining the ultimate state of mineral rights law in Maryland.

Separate Estates in Land: Maryland (10)

Calvert Joint Venture v. Snider:

373 Md. 18; 816 A.2d 854; 2003

- ▶ Two separate, coexisting interests are created in the property.
- ▶ ... a reservation of mineral rights by a grantor creates two independent, distinct and co-existing interests in one parcel of land; one in the whole property subject to a reservation of mineral rights and one in the minerals beneath the surface of the land.

Separate Estates in Land: Maryland (11)

Calvert Joint Venture v. Snider:
373 Md. 18; 816 A.2d 854; 2003

- ▶ The former is often described as the surface estate, although it is in reality the whole estate "subject to" the mineral rights.
- ▶ The latter is often referred to as the subsurface estate, although, ...
- ▶ ...as to the subsurface, it is only a limited right when reservation, as opposed to "exception" language, such as that contained in the present deed is used.

Right of Access to Minerals: Maryland (12)

Calvert Joint Venture v. Snider:
373 Md. 18; 816 A.2d 854; 2003

- ▶ Generally, while this State has yet to speak to the issue, once the mineral rights have been reserved (or granted) and the whole estate has been encumbered by the instrument of conveyance, ...
- ▶ ...some other states have found that the reservation, conveyance or leasing of mineral rights includes an implied easement for the owner of those rights to ingress, egress, occupy and use the surface of land, ...
- ▶ ...as reasonably necessary, for the purpose of extracting those minerals in the absence of specific language granting those rights.

Dominant Estate: Maryland (13)

Calvert Joint Venture v. Snider:
373 Md. 18; 816 A.2d 854; 2003

- ▶ *Flying Diamond Corp. v. Rust*, 551 P.2d 509, 511, 511 n.1 (Utah 1976)
- ▶ ...that the ownership (or rights of a lessee) of mineral rights in land is dominant over the rights of the owner of the fee to the extent reasonably necessary to extract the minerals therefrom"
- ▶ *Phillips v. Fox*, 193 W. Va. 657, 662-63, 458 S.E.2d 327, 332-33 (1995) (reiterating the well-settled West Virginia law that "ownership of a mineral estate includes the right to enter upon and use the superjacent surface by such manner and means as is fairly reasonable and necessary to reach and remove the minerals"

How far to extend the rule?: Maryland (14)

Calvert Joint Venture v. Snider:
373 Md. 18; 816 A.2d 854; 2003

- ▶ A right to underground minerals might be valueless without the right to access the minerals.
- ▶ However, the creation of an implied easement is affected by other factors; an implied easement exists only if, at the time of the separation of the mineral rights there exists an actual necessity for the owner of said rights to enter the surface lands above those minerals in order to derive value from or make use of the interests in the minerals.
- ▶ This Court has consistently said: "It is only in cases of the strictest necessity, and where it would not be reasonable to suppose that the parties intended the contrary, that the principle of implied reservation can be invoked."

Exception vs. Reservation: Maryland (15)

Calvert Joint Venture v. Snider:
373 Md. 18; 816 A.2d 854; 2003

- ▶ As the deed in George's Creek "excepted" and "reserved" from the conveyance, it can be properly said that the grantor retained an "estate" as well as an interest in the minerals "excepted" from the conveyance.
- ▶ It would appear to be the better practice to both "except" minerals from conveyances and "reserve" the right to mine, i.e., extract them.
- ▶ In the present case, as we have noted, the grantor failed to reserve express access easements ...

Strip Mining: Maryland (16)

Calvert Joint Venture v. Snider:
373 Md. 18; 816 A.2d 854; 2003

- ▶ In *Roches Bros., Inc. v. Duricka*, ... the Supreme Court of Pennsylvania, in its disallowance of strip mining operations pursuant to the deed conveying extremely broad mining rights in that case, said:
- ▶ "It is obvious, in view of the surface violence, destruction and disfiguration which inevitably attend strip or open mining, that **no land owner would lightly or casually grant strip mining rights**, nor would any purchaser of land treat lightly any reservation of mining rights which would permit the grantor or his assignee to come upon his land and turn it into a battleground with strip mining."

Conclusion: Maryland (17)
Calvert Joint Venture v. Snider:
373 Md. 18; 816 A.2d 854; 2003

- ▶ When a grantor conveys surface rights knowing that the purpose of the grantee is to utilize the surface for a particular purpose such as a residential home subdivision, ...
- ▶ ...there is no inference that can be reasonably drawn, merely from the reservation of mineral rights, that the grantor reserves the right to an easement to disturb the surface to access the minerals in a way that would disturb the intended surface use so as to make that use impracticable.

Unusual Mining Problems

Multiple Easements Possible: West .Va.
Porter v. Mack: 65 W. Va. 636; 64 S.E. 853; 1909

- ▶ "As **against the owner of the surface, each of the several purchasers** would have the right, without any express words of grant for that purpose, **to go upon the surface to open a way by shaft, or drift, or well, to his underlying estate**, and to occupy so much of the surface, beyond the limits of his shaft, drift, or well, as might be necessary to operate his estate, and remove the product thereof. **This is a right to be exercised with due regard to the owner of the surface**, and its exercise will be restrained within proper limits by a court of equity, if this becomes necessary; but subject to this limitation, it is a right growing out of the contract of sale, the position of the stratum sold, and the impossibility of reaching it in any other manner."

Access Water Below Coal: Indiana (1)
Pyramid Coal v. Pratt: 229 Ind. 648; 99 N.E.2d 427 (1951)

- ▶ **Apparently the matter of a way of necessity vertically from a surface estate to underlying strata has not been before the courts of Indiana until now** and in a measure we are required to pioneer.
- ▶ "It is a fundamental maxim that the title to land extends down to the center of earth, and up to the heavens, within the lines of gravitation; . . ." This being true it seems to follow logically and naturally that when the owner of the fee title to land sells to another an underlying stratum or seam of coal by a proper deed of conveyance, **he retains in himself, without special reservation, a way of necessity from the surface estate, vertically through the seam of coal so conveyed to his underlying estate** for a reasonable use thereof.

Access Water Below Coal: Indiana (2)
Pyramid Coal v. Pratt: 229 Ind. 648; 99 N.E.2d 427 (1951)

- ▶ "The position that **the owner of the coal is also the owner of the hole from which it has been removed**, and may forever prevent the surface owner from reaching underlying strata, **has no authority in reason, nor, . . . in law.** . . ."
- ▶ The owner of the coal must so enjoy his own rights as not to interfere with the lawful exercise of the rights of others who may own the estate, either above or below him. **The right of the surface owner to reach his estate below the coal exists at all times.** The exercise of it may be more difficult at some times than at others, and attended with both trouble and expense.

Access Water Below Coal: Indiana (3)
Pyramid Coal v. Pratt: 229 Ind. 648; 99 N.E.2d 427 (1951)

- ▶ **No one will deny the title of the surface owner to all that lies beneath the strata which he has sold.** It is as much a part of his estate as the surface. **If he is denied the means of access to it, he is literally deprived of an estate which he has never parted with . . .**" *Chartiers Block Coal Co., Appellant v. Mellon (1893), 152 Pa. 286, 297, 25 Atl. 597, 599 18 L. R. A. 702, 707, supra; Pa. Cent. Brewing Co. v. Lehigh Valley Coal Co. (1915), 250 Pa. 300, 95 Atl. 471.*
- ▶ It cannot matter whether the owner of the dominant estate was seeking water or oil, in penetrating the coal seam. His rights are identical no matter what he seeks to take from the underlying estate.

What happens when all Coal is removed?? Va.

Levisa Coal v. Consolidation Coal: (1)
276 Va. 44; 662 S.E.2d 44; 2008

- ▶ a grantee of coal in place is the owner, not of an incorporeal right to mine and remove, but of a **corporeal freehold estate in the coal, including the shell or containing chamber, and that as such owner he has the absolute right, until all of the coal has been exhausted, to use the passages opened for its removal for any and all purposes whatsoever,** including in particular the transportation of coal from adjacent lands, so long as he operates and uses the passages with due regard to the rights of the surface owner."

What happens when all Coal is removed?? Va.

Levisa Coal v. Consolidation Coal: (2)
276 Va. 44; 662 S.E.2d 44; 2008

- ▶ **After extensively reviewing the law from other jurisdictions,** we held that a deed or lease transferring a **coal estate** or portion thereof is **"the grant of an estate determinable [and w]hen the coal is all removed the estate ends for the plain reason that the subject of it has been carried away."** ...
- ▶ **Thus, "[t]he space [the coal] occupied reverts to the grantor by operation of law."** Id. Accordingly, we concluded that the right to use the tunnels and shafts extended only to the mining operations within the determinable estate, and **not to the support of mining operations on other lands.**

Using 1 tract to access another: Va. (3)

Levisa Coal v. Consolidation Coal:
276 Va. 44; 662 S.E.2d 44; 2008

- ▶ We can discern no practical distinction between supporting adjoining mining operations by using tunnels and shafts to transport coal, as in Clayborn, and the storing of wastewater from such operations in the voids, tunnels and shafts of an unrelated mine, as in this case.
- ▶ Accordingly, we are of opinion that when the 1937 deed conveyed the solid mineral estate of the Buchanan County parcels to Levisa Coal, the parties to that deed contemplated **only that the coal and other minerals would be mined from that estate,** and that the deed conveyed only **an incidental easement to use that portion of the parcels retained by the surface owner as was necessary to support such mining operations.** Nothing in the deed conveyed any right to use the voids, tunnels and shafts created below the surface for any purpose other than to support the mining operations on those parcels.

Survey of Riparian Boundary of a Mineral Estate

Arkansas: Riparian Boundary of Minerals: (1)

Swaim v. Stephens Production Co.:
359 Ark. 190; 196 S.W.3d 5 (2004)

- ▶ In *Nilsen v. Tenneco Oil Co.*, 1980 OK 14, 614 P.2d 36 (Okla. 1980), the Oklahoma Supreme Court was asked to decide **whether accretion carries with it title to the underlying minerals, when the minerals have been severed from the surface estate.**
- ▶ The **trial court had ruled** that a severed mineral interest could not be lost by accretion. **The Oklahoma Supreme Court disagreed** based upon its view that distinguishing between severed and unsevered mineral interests would allow fee owners to convey a greater mineral estate than they themselves possess.

Arkansas: Riparian Boundary of Minerals: (2)

Swaim v. Stephens Production Co.:
359 Ark. 190; 196 S.W.3d 5 (2004)

- ▶ The court also noted that such a rule would inevitably result in inequities because **an unsevered mineral interest would still be subject to loss by virtue of accretion;** whereas, a severed mineral interest would never be subject to such loss.
- ▶ **The Supreme Court of Montana** adopted the Nilsen court's analysis, holding that **severed mineral interests are subject to the doctrine of accretion.** Jackson v. Burlington Northern, Inc., 205 Mont. 200, 207, 667 P.2d 406, 409-410 (1983). Finally, **various treatises** on oil and gas law agree that the majority of courts are consistent in holding that **mineral rights are subject to the doctrine of accretion.**

Virginia: Surface boundary Dispute:

Buchanan Coal Co. v. Street:
175 Va. 531; 9 S.E.2d 339; 1940

- Under the circumstances of this case, the geographic extent of the surface and the geographic extent of the right to mine coal and minerals **are measured by the same yardstick and must coincide.**

Gas, Oil, and Fugitive Materials

COLORADO: Fugitive Materials.

Florence Oil v. Orman:
19 Colo. App. 79; 73 P. 628; 1903

- ... There is no other branch of mining where greater damage is done by delay. Coal and precious metals lie either in horizontal veins or in pockets. They remain where they are until removed.
- Oil and gas are the most uncertain, fluctuating, volatile, and fugitive of all mining properties.**
- They lie far below the surface, beyond the control of the human will, and beyond the reach of any legal process, whence they may flow unrestrained if the owner of the adjoining land bores a well down to the strata which holds them; and there is no law which can provide adequate, or indeed any, compensation for such results."

Surface Water vs. Underground Water:

Clarke Co. v. Miss. Lumber: 80 Miss. 535; 31 So. 905; 1902

- There is a marked distinction in the right of landowners to the use of surface and underground waters.**
- The waters below are presumed to be wandering, percolating waters** until a defined, continuous channel is shown; and even then, in order to apply to them the rules settled in reference to surface streams, it must be further shown, not only that the stream has a distinct, defined, underground channel, but this must be known or notorious.
- It is well understood that the **underground streams with well-defined channels will be treated as percolating waters if their existence and location are unknown** and not reasonably ascertainable.

Percolating Water: Maryland (1)

Finley v. Teeter Stone Inc.:
251 Md. 428; 248 A.2d 106; 1968

- Subterranean waters are generally considered to be of two distinct types:
(1) underground streams and
(2) percolating waters.
- To be classified as an underground stream, the water must flow in a definite and fixed channel whose existence and location is either known or may be ascertained from indications on the surface of the land or by other means without subsurface excavations to determine such existence and location.

Percolating Water: Maryland (2)

Finley v. Teeter Stone Inc.:
251 Md. 428; 248 A.2d 106; 1968

- Percolating waters, on the other hand, are those "which ooze, seep or filter through soil beneath the surface, without a defined channel, or in a course that is unknown and not discoverable from surface indications without excavation for that purpose.
- The fact that they may, in their underground course, at places come together so as to form veins or rivulets does not destroy their character as percolating waters."

Percolating Water: Maryland (3)

Finley v. Teeter Stone Inc.:
251 Md. 428; 248 A.2d 106; 1968

- ▶ Unless it can be shown that the "underground water flows in a defined and known channel it will be presumed to be percolating water."
- ▶ While normally the use of underground streams is governed by the same law as applies to those waters flowing in defined and fixed channels above the surface,
- ▶ ...a separate and distinct body of law has developed governing the use of percolating waters.

American Rule for water: Maryland (4)

Finley v. Teeter Stone Inc.:
251 Md. 428; 248 A.2d 106; 1968

- ▶ The other line of authority is known as the American Rule, and was developed in this country more recently, probably as a reaction to the harshness and abuses possible under the English Rule.
- ▶ Under it, in order for a landowner, who, ... obstructs, diverts, or removes percolating water to the injury of his neighbor, to escape liability, the activity or conduct causing such obstruction, diversion or removal **must be a reasonable exercise of his proprietary right**
- ▶ The American Rule is sometimes referred as the "Reasonable Use Rule" or the "Correlative Rights Rule."

Which Rule Applies?: Maryland (5)

Finley v. Teeter Stone Inc.:
251 Md. 428; 248 A.2d 106; 1968

- ▶ Although the language of the opinion in Martin rather indicates that the Court inclined to the American Rule, 4 we will, like our predecessors in that case, assume without deciding, that the American Rule does apply, as under either the English Rule or the American Rule, the Finleys cannot recover in this case.
- ▶ It is manifest that the conducting of quarrying operations is normally a legitimate and reasonable use of land, and certainly, in this case, there is no suggestion that such a use is unreasonable or inappropriate, considering all of the circumstances.

Gas & Oil – Fugitive materials: West .Va. (1)

McGregor v. Camden: 47 W. Va. 193; 34 S.E. 936; 1899

- ▶ **while oil and gas in place are regarded as real estate**, yet, being **fugitive in nature**, they are **not the absolute property** of the landowner **until he reduces them to possession**, and they become the property of him who first lawfully makes this reduction. They are the property of the landowner in the earth, **just as the air and water are his above the earth.**
- ▶ And his **neighbor has just the same right to drill an oil or gas well** as he has to dig for water or erect a windmill on his own land.

Oil wells and "fugitive Oil" Louisiana

Higgins Oil v. Guaranty Oil: 145 La. 233; 82 So. 206; 1919

- ▶ **The fact that some of the oil which plaintiff's pump is producing may come from defendant's land can make no difference**; for in the case of a flowing well so close to the boundary line that one-half of its product would to a reasonable certainty be known to be coming from the adjoining tract the owner of this tract would hardly, we imagine, claim either the ownership of one-half of the oil or the right to close the well; and the reason would be that an owner of land does not own the fugitive oil beneath it so as to have the right to follow it after it has left his land.
- ▶ **The analogy between the subterranean oil and subterranean or percolating waters is, we believe, near complete,**
- ▶ [kk note: this ruling also quoted by Va. Decision]

Kentucky. – Coal vs. Oil Rights (1)

Rice Brothers v. Talbot: 717 S.W.2d 515; 1986

- ▶ **Solid minerals in place are attached to the land itself**, but title to, or interest in those minerals may be severed from the land. **Hence, the purchaser of a severed mineral estate acquires both ownership of the solid minerals in place**
- ▶ **...and a right to go upon the surface owner's property** in order to take the designated minerals. *Trimble v. Kentucky River Coal Corporation*, 235 Ky. 301, 31 S.W.2d 367 (1930).

Kentucky. – Coal vs. Oil Rights (2)

Rice Brothers v. Talbot: 717 S.W.2d 515; 1986

- ▶ **Title to oil and gas in place, by contrast,** is a **qualified title**. Because **oil and gas are fugitive in nature**, they are **not owned in the same sense** that the surface or solid minerals beneath the surface are owned.
- ▶ Rather, ownership is **limited to possessing an exclusive legal right to explore** and, if oil or gas is found, **to reduce that substance to possession and ownership**.
- ▶ ...It follows, therefore, that the **lessee under an oil and gas lease acquires no title to any oil and gas in place**, but rather, acquires only a right to explore for oil and gas and to take title to oil and gas which are found and removed from the ground.

COLORADO: Oil Lease Abandoned. (1)

Florence Oil v. Orman: 19 Colo. App. 79; 73 P. 628; 1903

- ▶ This is an **oil lease**. Its consideration dependent on finding oil or gas in paying quantities.
- ▶ It *[the lease]* provides the number of wells, that is, the amount of work to be done in the search for oil during the first eighteen months of the term; it is silent as to the work to be done in the search during the remainder of the term, about eighteen years.
- ▶ **Three wells, more than the stipulated number, were sunk during the first eighteen months** of the running of the lease. **These, together with the fourth well sunk, proved practically dry,**

COLORADO: Oil Lease Abandoned. (2)

Florence Oil v. Orman: 19 Colo. App. 79; 73 P. 628; 1903

- ▶ The trial court held that appellant was required to make diligent effort to **satisfy the condition precedent to an estate in the leased property vesting, the finding of oil or gas in paying quantities;**
- ▶ that by its **more than four years' non-action it had failed to exercise this diligence, and had therefore lost its rights.**
- ▶ *[KK note: trial court decision upheld by appeals court]*

COLORADO: Oil Lease Abandoned. (3)

Florence Oil v. Orman: 19 Colo. App. 79; 73 P. 628; 1903

- ▶ *In Steelsmith v. Gartlan et al., 45 W. Va. 27, 29 S.E. 978, February, 1895,* The court held that the **lease, until oil was found in paying quantities, amounted to nothing more than a privilege to search the premises for oil and gas,** and that the failure to prosecute the search with diligence, in the absence of oil being found in paying quantities, worked a loss to the lessee of all rights under the lease...

COLORADO: Oil Lease Abandoned. (4)

Florence Oil v. Orman: 19 Colo. App. 79; 73 P. 628; 1903

- ▶ A **vested title cannot ordinarily be lost by abandonment in a less time than is fixed by the statute of limitations**, unless there is satisfactory proof of the intention to abandon. **An oil lease stands on quite a different ground. The title is inchoate,** and for the purpose of exploration only, until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned

Rule of Capture: Water, Gas, Oil:

Clarke Co. v. Miss. Lumber: 80 Miss. 535; 31 So. 905; 1902

- ▶ The right to bore for water to be used on the land for the business uses of the owner of the land is fully recognized. **This right is nowhere denied.**
- ▶ The mere boring of a single well **might destroy the well of a neighbor on a lower level,** but this would **furnish no cause of action.**

Rule of Capture Natural Gas and Coal Bed Methant

Kentucky. – Rule of Capture (1)

Bowles v. Hopkins: 347 S.W.3d 59; 2011

- ▶ The trial court, *citing to the Illinois case of Continental Resources of Illinois, Inc. v. Illinois Methane, LLC.*, applied the rule of capture to the CBM. That case states, in relevant part:
- ▶ Oil and gas in place are minerals, but because of their fugacious qualities, they are incapable of ownership distinct from the soil. They belong to the owner of the land only so long as they remain under the land, and if the owner makes a grant of them to another, it is a grant only of the gas and oil that the grantee takes from the land.

Kentucky. – Rule of Capture & Coalbed Gas (2)

Bowles v. Hopkins: 347 S.W.3d 59; 2011

- ▶ Oil and gas are incapable of ownership until actually found and produced. This principle is the basis for the rule of capture.
- ▶ Under the rule of capture, gas that migrates from one property to another is subject to recovery and possession by the holder of the gas estate on the property to which the gas migrates.
- ▶ Because coalbed gas is similar to and migrates in the same manner as other natural gas, there is no reason that the rule of capture and the laws governing the ownership of migratory natural gas should not apply to coalbed methane gas as well.

Kentucky. – Rule of Capture (3)

Bowles v. Hopkins: 347 S.W.3d 59; 2011

- ▶ The Kentucky Supreme Court, in Texas American Energy, likened the characteristics of oil and gas to the fugacious nature of a wild fox. Id. So long as the fox remains uncaptured, it belongs to no one, but is subject to capture and ownership by the land owner. Id. (emphasis added). However, once the fox has migrated to another piece of property, it is then subject to capture and ownership by the owner of that property. Id.
- ▶ The Court therefore concluded that, like the wild fox, oil and gas belong to no one but instead are subject to capture and ownership by the owner of the land upon which they reside at any given time.

Kentucky. – Coal Bed Methane (CBM) (4)

Bowles v. Hopkins: 347 S.W.3d 59; 2011

- ▶ Under the definition of CBM ... CBM is actually located within the strata of the coal beds. Therefore, it is available to be captured only by the owners of the coal beds.
- ▶ At the time that the CBM is released from the coal beds, it is then available to be captured by the owner of whatever property to which it migrates, in this case perhaps that of the Appellants.
- ▶ ... At the time the coal beds were conveyed, CBM was not actively being pursued as a profitable product but was instead considered a valueless, dangerous waste product.

We do not believe it was the intent of Eva Cardwell to retain any ownership interest in a valueless waste product.

Horizontal Drilling Hydraulic Fracturing

Gas & Oil – Fracturing: US Court: (1)

Stone v. Chesapeake Appalachia: Civil Action
No. 5:12-CV-102 – 2013 N. Dist. West Va.

- ▶ **"Two technologies have made gas production possible in the once-unusable Marcellus region – horizontal drilling and hydraulic fracturing.** These techniques, which saw their first significant action in natural gas production in Texas's Barnett Shale, are relatively new to the Appalachian Basin.
- ▶ While the **first true horizontal oil well was completed in Texas in 1929**, there was little use for the technique until the **1980s**, when the invention of downhole telemetry equipment and improved drilling motors turned what was once a far – fetched idea into an economically viable practice.

Gas & Oil – Fracturing: US Court: (2)

Stone v. Chesapeake Appalachia: Civil Action
No. 5:12-CV-102 – 2013 N. Dist. West Va.

- ▶ The defendants in this case urge this Court to follow the lead of the *Supreme Court of Texas, which, in Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1 (Tex. 2008)*, held that the landowners' **claims of trespass where the operator extended hydraulic fracturing underlying the landowners' property was barred by the rule of capture.**
- ▶ The Court in Garza stated the issue as being "whether subsurface hydraulic fracturing of a natural gas well that extends into another's property is a trespass for which the value of gas drained as a result may be recovered as damages."

Gas & Oil – Fracturing: US Court: (3)

Stone v. Chesapeake Appalachia: Civil Action
No. 5:12-CV-102 – 2013 N. Dist. West Va.

- ▶ In *Young v. Ethyl Corp.*, 521 F.2d 771 (8th Cir. 1975), a similar case involving injection rather than hydraulic fracturing, the Eighth Circuit stated:
- ▶ [W]e do not believe that the Arkansas Supreme Court **would extend a rule developed in the field of oil and gas to the forced migration** of minerals of different physical properties. The rule of capture has been applied exclusively, so far as we know, to the escape, seepage, or drainage of "fugacious" minerals which occurs ...

Gas & Oil – Fracturing: US Court: (4)

Stone v. Chesapeake Appalachia: Civil Action
No. 5:12-CV-102 – 2013 N. Dist. West Va.

- ▶ ...We agree with the defendants that the Arkansas Supreme Court foreclosed such arguments with respect to the drainage of minerals from adjacent lands.
- ▶ **...We believe that it would be unwise to extend the rule to situations in which non-fugacious minerals are forced from beneath a landowner's property.**

Gas & Oil – Fracturing: US Court: (5)

Stone v. Chesapeake Appalachia: Civil Action
No. 5:12-CV-102 – 2013 N. Dist. West Va.

- ▶ **The fourth justification is that everyone in the industry wants the rule of capture to apply to this situation.** This Court sees no reason why the desires of the industry should overcome the property rights of small landowners.
- ▶ In that regard, it is **significant that the Texas Supreme Court stated that the maxim – "'*cujus est solum ejus est usque ad coelum et ad inferos*' – has no place in the modern world."**

Gas & Oil – Fracturing: US Court: (6)

Stone v. Chesapeake Appalachia: Civil Action
No. 5:12-CV-102 – 2013 N. Dist. West Va.

- ▶ Significantly, the West Virginia Supreme Court of Appeals as recently as 2003 reaffirmed the maxim, stating that ...
- ▶ "we are considering the case of a lessor who owned from the heavens to the center of the earth. '*Cujus est solum, ejus est usque ad coelum et ad inferos.*'"

Gas & Oil – Fracturing: US Court: (7)

Stone v. Chesapeake Appalachia: Civil Action
No. 5:12-CV-102 – 2013 N. Dist. West Va.

- Based upon the foregoing, this Court finds, and believes that the West Virginia Supreme Court of Appeals would find, that **hydraulic fracturing under the land of a neighboring property without that party's consent is not protected by the "rule of capture," but rather constitutes an actionable trespass.**

Marcellus Shale – Pennsylvania (1)

Butler v. Powers: 620 Pa. 1; 65 A.3d 885; 2013

- "**coalbed gas**," which is a combination of methane, ethane, propane and other gases.
- Within the coal mining and natural gas industries, coalbed gas, which is found within crevices and empty pockets in coal seams and commonly known among miners as "firedamp," bears "little if any distinction [from] the gas found in oil-and-gas-bearing sands (natural gas)."
- While we recognize that hydrofracturing methods are employed to obtain both coalbed gas and Marcellus shale natural gas, the basis of the Dunham Rule lies in the common understanding of the substance itself, not the means used to bring those substances to the surface.

Natural Gas: Maryland (1)

Sierra Club v. Dominion Cove Point LNG
216 Md. App. 322; 86 A.3d 82; 2014

- Since 2005, the domestic natural gas market has changed dramatically. A new procedure known as hydraulic fracturing ("fracking") has unlocked vast new supplies of natural gas in the United States. Fracking is a process by which gas companies drill into layers of shale rock and extract gas reserves from within the rock.
- In response to the new fracking developments, in 2011, Dominion announced plans to expand its Cove Point operations in order to add new export capabilities.

Natural Gas: Maryland (2)

Sierra Club v. Dominion Cove Point LNG
216 Md. App. 322; 86 A.3d 82; 2014

- The Sierra Club argued that the 2005 Agreement does not authorize Dominion to export LNG from the Cove Point facility because the Agreement "limits Dominion to an exclusive list of enumerated activities at Cove Point, and export of LNG is not authorized by that list."
- Following a hearing on the cross motions, the circuit court issued an opinion and order in favor of Dominion.

How to Interpret a Document: Maryland (3)

Sierra Club v. Dominion Cove:
216 Md. App. 322; 86 A.3d 82; 2014

- In Maryland, when interpreting a contract, courts "seek to ascertain and effectuate the intention of the contracting parties."
- In ascertaining the parties' intent, Maryland adheres to the objective theory of contract interpretation.
- The objective theory of contract interpretation requires that a court "must first determine from the language of the agreement itself what a reasonable person in the position of the parties would have meant at the time it was effectuated.

How to Interpret a Document: Maryland (4)

Sierra Club v. Dominion Cove:
216 Md. App. 322; 86 A.3d 82; 2014

- In addition, when the language of the contract is plain and unambiguous there is no room for construction, and a court must presume that the parties meant what they expressed.
- In these circumstances, the true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant."

When is it ambiguous?: Maryland (5)

Sierra Club v. Dominion Cove Point LNG
216 Md. App. 322; 86 A.3d 82; 2014

- ▶ The process for determining the intent of the contracting parties is well established in Maryland.
- ▶ First, a court must ascertain whether the agreement is ambiguous.
- ▶ Language in a contract "may be ambiguous if it is 'general' and may suggest two meanings to a reasonably prudent layperson."
- ▶ However, this Court has acknowledged that a contract is not ambiguous merely because the parties disagree as to its meaning.

When is it ambiguous?: Maryland (6)

Sierra Club v. Dominion Cove Point LNG
216 Md. App. 322; 86 A.3d 82; 2014

- ▶ A court must presume that the terms expressed in the agreement are what the parties intended, regardless of what the parties may have meant, but did not state in the contract.
- ▶ When contract language is clear and unambiguous, there is no room for construction and courts may not consider what the parties thought the agreement meant.

When is it ambiguous?: Maryland (7)

Sierra Club v. Dominion Cove Point LNG
216 Md. App. 322; 86 A.3d 82; 2014

- ▶ "[w]here the instrument includes clear and unambiguous language of the parties' intent, we will not sail into less charted waters to interpret 'what the parties thought the agreement meant or intended to mean.'"
- ▶ We explained that this rule is to ensure "certainty in contracting" and that it is especially applied as to restrictive covenants which "are meant to be enforced as written."

Conclusion: Maryland (8)

Sierra Club v. Dominion Cove Point LNG
216 Md. App. 322; 86 A.3d 82; 2014

- ▶ We do not wish to underestimate the potential environmental impacts this project may have on the Cove Point site and the Chesapeake Bay.
- ▶ However, Sierra Club had an opportunity, when it drafted the Agreement, to express concerns regarding environmental impacts. Sierra Club negotiated these restrictions, easements and covenants in an effort to permit industrial development that was effective and sustainable.
- ▶ activities Dominion wishes to perform now are permitted by the 2005 Agreement.

Railroads

Railroad: Fee or Easement (1)

Ray v. King County:
120 Wn. App. 564; 86 P.3d 183 (2004)

- ▶ The court began its analysis by noting that the decisions dealing with conveyancing of **rights-of-way to railroads in various jurisdictions "are in considerable disarray"** ...
- ▶ ...and "turn on a case-by-case examination of each deed." In Washington, the general rule is that when construing a deed, **"the intent of the parties is of paramount importance and the court's duty to ascertain and enforce."**
- ▶ **The court then identified the following factors for determining intent:**

Railroad: Fee or Easement (2)

Ray v. King County:
120 Wn. App. 564; 86 P.3d 183 (2004)

- ▶ (1) **whether the deed conveyed a strip of land, and did not contain additional language relating to the use or purpose** to which the land was to be put, or in other ways **limiting the estate** conveyed;
- ▶ (2) whether the deed conveyed a strip of land and limited its use to a **specific purpose**;
- ▶ (3) whether the deed **conveyed a right of way over a tract** of land, rather than a strip thereof;
- ▶ (4) whether the deed granted **only the privilege of constructing, operating, or maintaining** a railroad over the land;

Railroad: Fee or Easement (3)

Ray v. King County:
120 Wn. App. 564; 86 P.3d 183 (2004)

- ▶ (5) whether the deed contained a clause providing that if the railroad ceased to operate, the **land conveyed would revert** to the grantor;
- ▶ (6) whether the **consideration expressed** was substantial or nominal; and
- ▶ (7) whether the conveyance did or did not contain a **habendum clause**, and many other considerations suggested by the language of the particular deed.
- ▶ In addition to the language of the deed, we will also look at the **circumstances surrounding the deed's execution and the subsequent conduct** of the parties.

Railroad Rights of Way: Recent Ruling (1)

Brandt. v. U.S.A.: No. 12-1173. March 10, 2014

- ▶ This case presents the question of **what happens to a railroad's right of way** granted under a particular statute--the General **Railroad Right-of-Way Act of 1875--when the railroad abandons it**;
- ▶ does it go to the Government, or to the private party who acquired the land underlying the right of way?

Railroad Rights of Way: Recent Ruling (1A)

Brandt. v. U.S.A.: No. 12-1173. March 10, 2014

- ▶ In the early **1860s, Congress began granting to railroad companies rights of way through the public domain**, accompanied by **outright grants** of land along those rights of way.
- ▶ The land was conveyed in **checkerboard blocks**. For example, under the Union Pacific Act of 1862, odd-numbered lots of one square mile apiece were granted to the railroad, while even-numbered lots were retained by the United States.

Railroad Rights of Way: Recent Ruling (2)

Brandt. v. U.S.A.: No. 12-1173. March 10, 2014

- ▶ **But public resentment against such generous land grants to railroads began to grow** in the late 1860s. Western settlers, initially some of the staunchest supporters of governmental railroad subsidization, complained that the railroads moved too slowly in placing their lands on the market and into the hands of farmers and settlers.
- ▶ **...By the 1870s, legislators across the political spectrum had embraced a policy of reserving public lands for settlers rather than granting them to railroads.**

Railroad Rights of Way: Recent Ruling (3)

Brandt. v. U.S.A.: No. 12-1173. March 10, 2014

- ▶ **A House resolution adopted in 1872** summed up the change in national policy, stating:
- ▶ "That in the judgment of this House **the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued**, and that every consideration of public policy and equal justice to the whole people requires that the public lands should be held for the purpose of securing homesteads to actual settlers, and for educational purposes, as may be provided by law."

Railroad Rights of Way: Recent Ruling (4)

Brandt. v. U.S.A.: No. 12-1173. March 10, 2014

- › Congress enacted the **last checkerboard land-grant statute for railroads in 1871**. Gates, supra, at 380. Still wishing to encourage railroad construction, however, Congress passed at least **15 special acts between 1871 and 1875** granting to designated railroads "the right of way" through public lands, without any accompanying land subsidy.
- › **Rather than continue to enact special legislation for each such right of way, Congress passed the General Railroad Right-of-Way Act of 1875**, 18 Stat. 482, 43 U. S. C. §§934-939.

Railroad Rights of Way: Recent Ruling (5)

Brandt. v. U.S.A.: No. 12-1173. March 10, 2014

- › The 1875 Act provided that **"[t]he right of way through the public lands of the United States** is granted to any railroad company" meeting certain requirements, "to the extent of one hundred feet on each side of the central line of said road." §934. A railroad company could obtain a right of way by the "actual construction of its road" or "in advance of construction by filing a map as provided in section four" of the Act.
- › The 1875 Act remained in effect until 1976, when its provisions governing the issuance of new rights of way were re-pealed by the Federal Land Policy and Management Act,

Railroad Rights of Way: Recent Ruling (6)

Brandt. v. U.S.A.: No. 12-1173. March 10, 2014

- › **In 1976, the United States patented an 83-acre parcel of land** in Fox Park, surrounded by the Medicine Bow-Routt National Forest, to Melvin and Lulu Brandt.
- › **fee simple title to the land** "with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto said claimants, their successors and assigns, forever."
- › **"subject to those rights for railroad purposes as have been granted to the Laramie[,] Hahn's Peak & Pacific Railway Company, its successors or assigns."** ...The patent did not specify what would occur if the railroad abandoned this right of way.

Railroad Rights of Way: Recent Ruling (7)

Brandt. v. U.S.A.: No. 12-1173. March 10, 2014

- › The right of way referred to in the patent was obtained by the Laramie, Hahn's Peak and Pacific Railroad (LHP&P) in 1908, **pursuant to the 1875 Act**.
- › In 1911, the LHP&P completed construction of its railway over the right of way, **from Laramie to Coalmont, Colorado**.
- › in 1996 the Wyoming and Colorado **notified the Surface Transportation Board of its intent to abandon the right of way**. The railroad tore up the tracks and ties and, after receiving Board approval, completed abandonment in 2004. In 2006 the United States initiated this action seeking a judicial declaration of abandonment and an order quieting title in the United States to the abandoned right of way.

Railroad Rights of Way: Recent Ruling (8)

Brandt. v. U.S.A.: No. 12-1173. March 10, 2014

- › **Brandt asserted that the stretch of the right of way crossing his family's land was a mere easement that was extinguished upon abandonment by the railroad**, so that, under common law property rules, he enjoyed full title to the land without the burden of the easement.
- › The **Government countered** that it had all along retained a **reversionary interest** in the railroad right of way—that is, a future estate that would be restored to the United States if the railroad abandoned or forfeited its interest.

Railroad Rights of Way: Recent Ruling (9)

Brandt. v. U.S.A.: No. 12-1173. March 10, 2014

- › The Government does not dispute that easements normally work this way, but maintains that the 1875 Act granted the railroads something more than an easement, reserving an implied reversionary interest in that something more to the United States.
- › The Government loses that argument today, in large part because it won when it argued the opposite before this Court more than 70 years ago, in the case of *Great Northern Railway Co. v. United States*, 315 U. S. 262, 62 S. Ct. 529, 86 L. Ed. 836 (1942).

Railroad Rights of Way: Recent Ruling (10)

Brandt. v. U.S.A.: No. 12-1173. March 10, 2014

- ▶ In 1907, Great Northern succeeded to an 1875 Act right of way that ran through public lands in Glacier County, Montana.
- ▶ **Oil was later discovered in the area, and Great Northern wanted to drill beneath its right of way.**
- ▶ But the Government sued to enjoin the railroad from doing so, claiming that the railroad had only an easement, so that the United States retained all interests beneath the surface.

Railroad Rights of Way: Recent Ruling (11)

Brandt. v. U.S.A.: No. 12-1173. March 10, 2014

- ▶ The Court found Section 4 of the Act "especially persuasive," because it provided that **"all such lands over which such right of way shall pass shall be disposed of subject to such right of way."** Ibid. Calling this language **"wholly inconsistent" with the grant of a fee interest**, the Court endorsed the lower court's statement that "[a]fter words to indicate the intent to convey an easement would be difficult to find."
- ▶ An **easement is a "nonpossessory right** to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement."

Railroad Rights of Way: Recent Ruling (12)

Brandt. v. U.S.A.: No. 12-1173. March 10, 2014

- ▶ Because **granting an easement merely gives the grantee the right to enter and use the grantor's land for a certain purpose**, but does not give the grantee any possessory interest in the land, it does not make sense under common law property principles to speak of the grantor of an easement having retained a "reversionary interest."
- ▶ A reversionary interest is "any future interest left in a transferor or his successor in interest." ...It arises when the grantor "transfers less than his entire interest" in a piece of land, and it is either certain or possible that he will retake the transferred interest at a future date.

Railroad Rights of Way: Recent Ruling (13)

Brandt. v. U.S.A.: No. 12-1173. March 10, 2014

- ▶ **Finally, as part of the National Trails System Improvements Act of 1988**, Congress changed course and **sought to retain title to abandoned or forfeited railroad rights of way**, specifying that "any and all right, title, interest, and estate of the United States" in such rights of way "shall remain in the United States" upon abandonment or forfeiture. 16 U. S. C. §1248(c).
- ▶ The **Government argues that these statutes prove that Congress intended to retain** (or at least believed it had retained) a reversionary interest in 1875 Act rights of way.

Railroad Rights of Way: Recent Ruling (14)

Brandt. v. U.S.A.: No. 12-1173. March 10, 2014

- ▶ **The statutes the Government cites do not purport to define (or redefine) the nature of the interest conveyed under the 1875 Act.** Nor do they shed light on what kind of property interest Congress intended to convey to railroads in 1875. See United States v. Price, 361 U. S. 304, 313, 80 S. Ct. 326, 4 L. Ed. 2d 334, 1960-1 C.B. 701 (1960) ("**the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one**").

Railroad Rights of Way: Recent Ruling (15)

Brandt. v. U.S.A.: No. 12-1173. March 10, 2014

- ▶ **In other words, these statutes do not tell us whether the United States has an interest in any particular right of way;** they simply tell us **how any interest the United States might have should be disposed of.**
- ▶ **For pre-1871 rights of way** in which the United States retained an implied reversionary interest, or for rights of way crossing public lands, **these statutes might make a difference** in what happens to a forfeited or abandoned right of way. But if there is no "right, title, interest, [or] estate of the United States" in the right of way, 43 U. S. C. §912, then the statutes simply do not apply.

Railroads: Great Northern v. USA (1)

315 U.S. 262; 62 S. Ct. 529; 86 L. Ed. 836 (1942)

- ▶ The United States instituted this suit to enjoin petitioner from drilling for or removing gas, oil and other minerals so situated, and alleged in its complaint substantially that petitioner, in 1907, acquired from the St. Paul, Minneapolis and Manitoba Railway all of the latter's property, including rights of way granted it under the Act of March 3, 1875, a portion of which crosses Glacier County, Montana;
- ▶ that petitioner acquired neither the right to use any portion of such right of way for the purpose of drilling for or removing subsurface oil and minerals, nor any right, title or interest in or to the deposits underlying the right of way

Railroads: Great Northern v. USA (2)

315 U.S. 262; 62 S. Ct. 529; 86 L. Ed. 836 (1942)

- ▶ The Act of March 3, 1875, from which petitioner's rights stem, clearly grants only an easement, and not a fee. Section 1 indicates that the right is one of passage since it grants "the," not a, "right of way through the public lands of the United States."
- ▶ Section 2 adds to the conclusion that **the right granted is one of use and occupancy only, rather than the land itself**, for it declares that any railroad whose right of way passes through a canyon, pass or defile "shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, in common with the road first located."

Railroads: Great Northern v. USA (3)

315 U.S. 262; 62 S. Ct. 529; 86 L. Ed. 836 (1942)

- ▶ Section 4 is especially persuasive. It requires the location of each right of way to be noted on the plats in the local land office, and **"thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way."** This reserved right to dispose of the lands subject to the right of way is wholly inconsistent with the grant of a fee.
- ▶ Apter words to indicate the intent to convey an easement would be difficult to find." That this was the precise intent of § 4 is clear from its legislative history.

Railroads: Great Northern v. USA (4)

315 U.S. 262; 62 S. Ct. 529; 86 L. Ed. 836 (1942)

- ▶ The Act was designed to permit the construction of railroads through the public lands and thus enhance their value and hasten their settlement. The achievement of that purpose does not compel a construction of the right of way grant as conveying a fee title to the land and the underlying minerals; a railroad may be operated though its right of way be but an easement.
- ▶ But we are not limited to the lifeless words of the statute and formalistic canons of construction in our search for the intent of Congress. **The Act was the product of a period, and, "courts, in construing a statute, may with propriety recur to the history of the times when it was passed."**

Railroads: Great Northern v. USA (5)

315 U.S. 262; 62 S. Ct. 529; 86 L. Ed. 836 (1942)

- ▶ **The first such interpretation, the general right of way circular of January 13, 1888, was that the Act granted an easement, not a fee.** The same position was taken in the regulations of March 21, 1892, ..., and those of November 4, 1898, ... While the first of these circulars followed the Act by 13 years, the weight to be accorded them is not dependent on strict contemporaneity.
- ▶ That petitioner has only an easement in its rights of way acquired under the Act of 1875 is therefore clear from the language of the Act, its legislative history, its early administrative interpretation and the construction placed upon it by Congress in subsequent enactments.

Recent Railroad Case: Maryland (1)

Chevy Chase Land Co. v. U.S.A.

355 Md. 110; 733 A.2d 1055; 1999

- ▶ The questions pertain to a right-of-way in Montgomery County called the "Georgetown Branch" that was granted to a railroad in 1911 and that has been converted for use as a hiker/biker trail under the federal "Rails-to-Trails" Act (the Act).
- ▶ The Fifth Amendment of the United States Constitution states in pertinent part: "nor shall private property be taken for public use, without just compensation".

What are the questions...: Maryland (2)

Chevy Chase Land Co. v. U.S.A.
355 Md. 110; 733 A.2d 1055; 1999

- ▶ , the case requires that we construe a 1911 deed from appellant Chevy Chase Land Company of Montgomery County (CCLC or the land company) to the Metropolitan Southern Railroad Company (MSRC or the railroad)...
- ▶ Under Maryland law, did the 1911 deed convey an interest in fee simple absolute or an easement?
- ▶ If the deed conveyed an easement, is the easement subject to any limitations as a matter of law?
- ▶ If the deed conveyed an easement, has the easement been abandoned as a matter of law since its conveyance and, if so, when?

Background & Location: Maryland (3)

Chevy Chase Land Co. v. U.S.A.
355 Md. 110; 733 A.2d 1055; 1999

- ▶ The property alleged to have been taken and for which the appellants seek compensation is a strip of land approximately one mile long and 100-foot wide, spanning some 12 acres in Montgomery County, Maryland, that lie on either side and across Connecticut Avenue in Chevy Chase.
- ▶ The mile-long stretch is a segment of an approximately 6.4 mile former railroad line in Montgomery County known as the Georgetown Branch, which runs from Silver Spring southwesterly into the District of Columbia.

Background & Location: Maryland (4)

Chevy Chase Land Co. v. U.S.A.
355 Md. 110; 733 A.2d 1055; 1999

- ▶ In 1891, the land company and the railroad entered into an agreement whereby the land company would convey the "right-of-way" over the mile-long stretch of land and a second parcel "for the purposes of a passenger and freight depot."
- ▶ The railroad missed the August 31, 1891, deadline, but built that portion of the line in 1892, while the rest of the line...
- ▶ In 1909, the Country Club bought more than 125 acres of land ...conveyed the property in two separate parcels ... with one parcel on each side of the railroad ...

Background & Location: Maryland (5)

Chevy Chase Land Co. v. U.S.A.
355 Md. 110; 733 A.2d 1055; 1999

- ▶ In 1911, after the railroad line had been constructed and in operation for 19 years, the land company executed a deed conveying to the railroad, "its successors and assigns, a free and perpetual right of way" over the land referred to in the 1891 agreement.
- ▶ The deed also conveyed, in "fee simple," the parcel of land on which the depot was to have been built. The railroad paid \$ 4,000 for the conveyance, and the deed stated that the 1891 agreement was "mutually abrogated, canceled and set aside,

Background & Location: Maryland (6)

Chevy Chase Land Co. v. U.S.A.
355 Md. 110; 733 A.2d 1055; 1999

- ▶ In 1983, ...the railroad posted a notice on the Georgetown Branch that it would be the subject of an abandonment application before the Interstate Commerce Commission (ICC).
- ▶ The ICC issued a tentative decision on February 25, 1988, permitting abandonment on condition that the railroad continue to maintain the right-of-way in order to facilitate the possible acquisition of the right-of-way for public use pursuant to the Rails-to-Trails Act,
- ▶ Montgomery County began discussions with the railroad about acquiring the right-of-way for a light-rail system as well as a hiker/biker path

Rules of Interpretation: Maryland (7)

Chevy Chase Land Co. v. U.S.A.
355 Md. 110; 733 A.2d 1055; 1999

- ▶ In construing a deed, we apply the principles of contract interpretation.
- ▶ These principles require consideration of "the character of the contract, its purpose, and the facts and circumstances of the parties at the time of execution,"
- ▶ Thus, we must consider the deed as a whole, viewing its language in light of the facts and circumstances of the transaction at issue as well as the governing law at the time of conveyance.

"Right of Way" means...: Maryland (8)

Chevy Chase Land Co. v. U.S.A.
355 Md. 110; 733 A.2d 1055; 1999

- ▶ In railroad parlance, "the term 'right of way' has two meanings: in one sense it is 'the strip of land upon which the track is laid'; in the other sense it is 'the legal right to use such strip,' and in this sense it usually means the right of way easement."
- ▶ it has generally been held by courts of this and other states that " deeds which in the granting clause convey a 'right of way' are held to convey an easement only.
- ▶ 'Where the intention to convey a fee does not appear, as in case of the conveyance of a "right of way" for the railroad through certain lands, the company takes an easement only.

Quoting Earlier Md. Ruling: Maryland (9)

Chevy Chase Land Co. v. U.S.A.
355 Md. 110; 733 A.2d 1055; 1999

- ▶ As we observed in *Green Tr. v. Eldridge*, 230 Md. 441, 448, 187 A.2d 674, 678 (1963): "The fact that the word 'easement' was not used to designate the property interest passing is not of particular significance, since use of the phrase 'right of way' is generally understood to mean that only an easement is being granted."
- ▶ the nation's railway system has lost about 130,000 miles of track since 1920 and noting that "experts predict that 3,000 miles will be abandoned every year through the end of this century"

Wide-Ranging research: Maryland (10)

Chevy Chase Land Co. v. U.S.A.
355 Md. 110; 733 A.2d 1055; 1999

- ▶ As the Indiana Supreme Court has explained:
- ▶ "Public policy does not favor the conveyance of strips of land by simple titles to railroad companies for right-of-way purposes, either by deed or condemnation.
- ▶ ...the alienation of such strips or belts of land from and across the primary or parent bodies of the land from which they are severed[] is obviously not necessary to the purpose for which such conveyances are made after abandonment of the intended uses as expressed in the conveyance,
- ▶ ...thereafter such severance generally operates adversely to the normal and best use of all the property involved."

Enabling Act is important: Maryland (11)

Chevy Chase Land Co. v. U.S.A.
355 Md. 110; 733 A.2d 1055; 1999

- ▶ This is not to say that a deed conveying a "right of way" to a railroad cannot convey an estate in fee simple.
- ▶ It is well settled that a deed to a railroad, even though it characterizes the grant as conveying a right-of-way, may convey an estate in fee simple. See *Hodges v. Owings*, 178 Md. 300, 303, 13 A.2d 338, 339 (1940)
- ▶ (observing that the railroad's charter authorized it to take an estate in fee).

The Deed Description: Maryland (12)

Chevy Chase Land Co. v. U.S.A.
355 Md. 110; 733 A.2d 1055; 1999

- ▶ *"The said party of the first part [the land company] for and in consideration of the sum of FOUR THOUSAND (4,000) DOLLARS, to it paid by the said party of the second part, does hereby grant and convey unto the said party of the second part [the railroad], its successors and*
- ▶ *assigns, a free and perpetual right of way, one hundred (100) feet wide, over the land and premises hereinafter designated as 'Parcel A' and does hereby grant and convey unto the said party of the second part [the railroad], its successors and assigns, in fee simple, the land and premises, hereinafter designated as 'Parcel B'...."*

Language of the Deed: Maryland (13)

Chevy Chase Land Co. v. U.S.A.
355 Md. 110; 733 A.2d 1055; 1999

- ▶ The language "free and perpetual" sheds no light on whether a nonpossessory or possessory interest is being conveyed, since an estate in fee or an easement may be "free and perpetual."
- ▶ We believe that the CFC's and appellees' construction of the deed is overly strained. If the land company intended to convey estates in fee over both parcels, it would have been unnecessary to include two separate granting clauses.
- ▶ Moreover, given that two granting clauses were used, if they had intended to convey the same interest, we believe the author of the deed would have used the same language.

Language of the Deed: Maryland (14)

Chevy Chase Land Co. v. U.S.A.
355 Md. 110; 733 A.2d 1055; 1999

- Appellees further attempt to bootstrap the description of Parcel A as a "parcel of land" into the granting clause to show that an estate in fee of the right-of-way was intended to be conveyed.
- We disagree as to the implications of the language "parcel of land" in the description of "Parcel A" in the deed. The language is used in the portion of the deed establishing the location of the right-of-way, not the interest granted.
- Language used in a descriptive clause is less important than the language of the granting clause in denoting what interest in land is conveyed by a deed.

Price Paid: Maryland (15)

Chevy Chase Land Co. v. U.S.A.
355 Md. 110; 733 A.2d 1055; 1999

- This leads to an additional factor that courts consider in determining whether a fee simple estate or an easement is granted by a deed conveying a "right-of-way" -- the amount of consideration paid for the deed. Deed to Railroad Company as Conveying Fee or Easement,"
- The fact that the consideration paid was less than the value of a fee simple estate in the land, weighs strongly in favor of finding that they intended an easement.

Intended for What purpose?: Maryland (16)

Chevy Chase Land Co. v. U.S.A.
355 Md. 110; 733 A.2d 1055; 1999

- No language in the deed in the instant case suggests that the right-of-way was limited to railroad purposes only (and much less so to freight railroad purposes, as the land company contends).
- The deed conveyed a "free and perpetual right of way." The use of the terms "free" and "perpetual" provide a clear indication that few, if any, conditions were intended to be placed on the railroad's use of the right-of-way.

Intended for What purpose?: Maryland (17)

Chevy Chase Land Co. v. U.S.A.
355 Md. 110; 733 A.2d 1055; 1999

- Unlike many of the grants of easements that we have addressed in the past, the deed in the instant case does not suggest any limit on the use of the right-of-way.
- It is clear that a right of passage was granted, and, ...the circumstances clearly indicate that the original instrumentality was a railroad.
- ...nowhere in the granting clause or elsewhere in the deed does the language suggest that a railroad was the only instrumentality for use of the perpetual right-of-way.
- For example, nowhere does language "for railroad purposes" appear, and there are no other express limitations on the use of the right-of-way.

Intended for What purpose?: Maryland (18)

Chevy Chase Land Co. v. U.S.A.
355 Md. 110; 733 A.2d 1055; 1999

- We have long accepted the view that railroads are public service corporations.
- In Whalen, we accepted the notion that a railroad is "obliged to use its powers and privileges for the benefit of the public, and in aid of the public good."
- Because the public nature of the railroad business was obvious at the time of the 1911 deed, we must assume that the land company knew that its grant was subject to reasonable accommodations for the public use and that, if it wanted to limit the uses of the right-of-way to rail use only, it would have included appropriate limiting language in its deed.

Intended for What purpose?: Maryland (19)

Chevy Chase Land Co. v. U.S.A.
355 Md. 110; 733 A.2d 1055; 1999

- We have long considered a railroad line as analogous to a public highway.
- The early decisions of this state adhere to the view that the purpose for which the public easement was acquired is the overriding factor in the analysis rather than the mode or instrumentality of use.
- the starting point for determining whether the current use of the Georgetown Branch as a hiker/biker trail is compatible with its prior use is the deed itself.

Rails to Trails Act: Maryland (20)

Chevy Chase Land Co. v. U.S.A.
355 Md. 110; 733 A.2d 1055; 1999

- ▶ Federal and state laws explicitly recognize the value to the general public of railroad rights-of-way. The federal Rails-to-Trails Act, which serves as the impetus for this lawsuit, is an obvious example of the perceived public value of railroad corridors.
- ▶ "Congress intended 'to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use'). The Maryland legislature has also recognized the public value of railroad rights-of-way.

Rails to Trails Act: Maryland (21)

Chevy Chase Land Co. v. U.S.A.
355 Md. 110; 733 A.2d 1055; 1999

- ▶ A different outcome was reached by the Supreme Court of Washington in *Lawson* ...
- ▶ That court held that a right-of-way conveyed to a railroad reverted to the fee owners when it was conveyed to the local government for use as a recreational trail.
- ▶ The Lawson court's decision, however, turned on its acceptance of the deeds at issue as being expressly limited to "railroad purposes only."
- ▶ That court stated: "We hold that a change in use from 'rails to trails' constitutes abandonment of an easement which was granted for railroad purposes only."

Was easement abandoned?: Maryland (22)

Chevy Chase Land Co. v. U.S.A.
355 Md. 110; 733 A.2d 1055; 1999

- ▶ The final issue we address is the certified question regarding whether the railroad's easement has been abandoned. We initially observe that appellants' arguments on abandonment appear to be predicated on their contention that the scope of the easement was for railroad purposes.

Was easement abandoned?: Maryland (23)

Chevy Chase Land Co. v. U.S.A.
355 Md. 110; 733 A.2d 1055; 1999

- ▶ ...if the scope of the easement were limited to railroad purposes, then an intent to abandon railroad use could indicate an intent to abandon the easement. However, the converse is also true.
- ▶ If the easement is not limited in its scope to railroad purposes, then, in order for there to be an abandonment, the party alleging abandonment must show more than an intent to abandon railroad service.

Was easement abandoned?: Maryland (24)

Chevy Chase Land Co. v. U.S.A.
355 Md. 110; 733 A.2d 1055; 1999

- ▶ The general rule is that the right and title to a mere easement in land acquired by a quasi-public corporation, either by purchase, condemnation or prescription, for a public purpose is dependent upon the continued use of the property for that purpose, and when such public use is abandoned the right to hold the land ceases, and the property reverts to its original owner or his successors in title."

Was easement abandoned?: Maryland (25)

Chevy Chase Land Co. v. U.S.A.
355 Md. 110; 733 A.2d 1055; 1999

- ▶ Since we have held that the scope of the easement permits use of the right-of-way as a trail, the facts indicating that the railroad did not intend to resume rail service prove unhelpful to appellants' abandonment arguments.
- ▶ We held in Part III that the trail use, ...is a "continued use of the property for the purpose" for which it was conveyed, i.e., transit uses.
- ▶ To the extent that appellants' abandonment arguments rest on their contention that the scope of the easement is limited to railroad purposes, they fail to meet their burden of proving abandonment.

Abandonment: Federal Standard: Maryland (26)

Chevy Chase Land Co. v. U.S.A.
355 Md. 110; 733 A.2d 1055; 1999

- ▶ Federal law also controls a railroad's abandonment of its railroad lines or the discontinuation of rail service over any part of its lines. ... (requiring a railroad to obtain a certificate of abandonment or discontinuance prior to taking either action).
- ▶ *Colorado v. United States*, 271 U.S. 153, 168-69, 46 S. Ct. 452, 456, 70 L. Ed. 878, 885-86 (1926). When the ICC issues an order finding that public convenience and necessity allow a carrier to abandon a line, that order is permissive, not compulsory, and the railroad may choose not to exercise its permission to abandon.

Abandonment: Federal Standard: Maryland (27)

Chevy Chase Land Co. v. U.S.A.
355 Md. 110; 733 A.2d 1055; 1999

- ▶ The rails-to-trails provisions are triggered only when the railroad files an application with the ICC proposing to abandon the line. ... (requiring the entity interested in acquiring the right-of-way to participate when the rail line is "proposed to be abandoned");
- ▶ If the ICC finds the Act applicable, it will delay the effective date of the abandonment order pending negotiations between the proposed trail sponsor and the railroad.

Regulatory v. Property Rights: Maryland (28)

Chevy Chase Land Co. v. U.S.A.
355 Md. 110; 733 A.2d 1055; 1999

- ▶ Even if we were to conclude that the word "abandon" in the regulatory context could be synonymous with state law abandonment of an easement, the railroad's application to the ICC made clear that the "applicants seek to abandon and discontinue service" over the Georgetown Branch, not their interest in the land.
- ▶ The application repeatedly refers to the "proposed abandonment," and it noted that "various public bodies may be interested in acquiring the subject properties for public purposes or uses."

NC Railroads: An early Charter

pany, and the said company shall be entitled to hold in fee simple all lands belonging to the State, over and through which the said road may pass to an extent not exceeding one hundred feet on either side of said road; and in the absence of any contract or contracts in relation to lands through which said road may pass, it shall be presumed that the land over which said road may be constructed, together with one hundred feet on each side thereof, has been granted by the owner or owners to the company, and the said company shall have good right and title thereto, and shall have, hold and enjoy the same so long as it shall be used for the purposes of said road and no longer, unless the owner or owners

Colorado Railroads - As an entirety: (1)

Allard Cattle v. Colorado Southern Railroad
187 Colo. 1; 530 P.2d 503; 1974

- ▶ The defendant railroad, as successor in title of the other named defendants, **claims the land under a grant from the United States government made pursuant to the General Railroad Right-of-Way Act of 1875**, 43 U.S.C. §§ 934-939 (1970).
- ▶ The Act provided for grants to railroads of right-of-way one hundred feet in width on each side of the railroad bed across public lands. **The land in question in this case consists of the outer 50 feet on each side of the tracks, which lies outside fences erected by the railroad in compliance with C.R.S. 1963, 116-8-2.**

Colorado Railroads - As an entirety: (2)

Allard Cattle v. Colorado Southern Railroad
187 Colo. 1; 530 P.2d 503; 1974

- ▶ ...the **landowners contend that partial abandonment** of a right-of-way granted by Congress is **legally permissible**.
- ▶ Here, application of the principle set forth in Townsend - that a railroad cannot voluntarily alienate a part of the right-of-way granted by Congress -- is most appropriate; for in a case of abandonment, intent to abandon is the very essence of the claim.

Colorado Railroads – As an entirety: (3)

Allard Cattle v. Colorado Southern Railroad
187 Colo. 1; 530 P.2d 503; 1974

- ▶ "By granting a right-of-way **four hundred feet in width** Congress must be understood to have conclusively determined that **a strip of that width was necessary for a public work of such importance.**
- ▶ **Neither courts nor juries, therefore, nor the general public, may be permitted to conjecture that a portion of such right-of-way is no longer needed** for the use of the railroad and title to it has vested in whomsoever chooses to occupy the same. **The whole of the granted right-of-way must be presumed to be necessary** for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes."

Last inch as important as the first: Maryland Miller v. Kirkpatrick: 833 A.2d 536 (2003)

- ▶ There, as here, the defendant had chosen to deny the plaintiffs the use of a portion of the express easement. We said that a grant of **a right to use a piece of property includes "the last inch as well as the first inch,"** and therefore it is clear that the fence or obstruction placed upon it by defendant is an invasion of the plaintiff's legal rights, for which an action may be maintained."

Railroads: Grand Trunk v. Richardson (1) Origins of the Incidental use Doctrine

91 U.S. 454; 23 L. Ed. 356; 1875

- ▶ while it must be admitted that a railroad company has the **exclusive control of all the land within the lines** of its roadway, and is **not at liberty to alienate any part of it so as to interfere with the full exercise of the franchises granted**, we are not prepared to assert that it may not license the erection of buildings for its convenience, even though they may be also for the convenience of others. it is not doubted that the **defendant might have erected similar structures on the ground** on which the plaintiffs' buildings were placed, if in its judgment the structures were convenient for the receipt and delivery of freight on its road.

Railroads: Grand Trunk v. Richardson (2) Origins of the Incidental use Doctrine

91 U.S. 454; 23 L. Ed. 356; 1875

- ▶ **And, if the company might have put up the buildings, why might it not license others to do the same thing** for the same object; namely, the increase of its facilities for the receipt and delivery of freight? The public is not injured, and it has no right to complain, so long as a free and safe passage is left for the carriage of freight and passengers.

Virginia: Railroad Rights of Way (1)

Bailey v. Saltville:

279 Va. 627; 691 S.E.2d 491; 2010

- ▶ In determining whether the deed conveys an easement or a fee simple, this Court's rules of deed construction dictate that this Court must **"ascertain the intention of the parties, gathered from the language used, and the general purpose and scope of the instrument in the light of surrounding circumstances.** When such intention appears by giving the words their **natural and ordinary meaning**, technical rules of construction will not be invoked.

Virginia: Railroad Rights of Way (2)

Bailey v. Saltville:

279 Va. 627; 691 S.E.2d 491; 2010

- ▶ **In the 1904 edition of the Code of Virginia, applicable in 1909, § 2420** provided: Where any real estate is conveyed, devised or granted to any person without any words of limitation, such devise, conveyance or grant shall be construed to pass the fee simple or other whole estate or interest which the testator or grantor had power to dispose of in such real estate, unless a contrary intention shall appear by the will, conveyance or grant. (see also current Code § 55-11)

Class Problem: Fee Simple or Easement (1)

Corning v. Lehigh Valley Railroad Co.:
14 A.D.2d 156; 217 N.Y.S.2d 874; 1961

- ▶ The original fee owner of the tract agreed *[KK note: written agreement, see next slide]* to sell all necessary land to the railroad if the railroad built a railway station at a particular point.
- ▶ The railroad **built infrastructure and complied with all conditions of the original agreement**,
- ▶ ...but no deed was signed or recorded.
- ▶ Later purchasers purchased tracts with deeds that excepted the railroad's parcel of land.

Class Problem: Fee Simple or Easement (2)

Corning v. Lehigh Valley Railroad Co.:
14 A.D.2d 156; 217 N.Y.S.2d 874; 1961

- ▶ it was under seal and it read as follows: *"[The] said Daniel Valentine, in consideration of the sum of one dollar to him in hand paid, the receipt whereof is hereby acknowledged, hereby promises and agrees to and with the said Railroad Company to grant and convey to said Company, free of encumbrance and by a good and sufficient deed, all the land that said Company may require for the construction and convenient use of their Railroad, upon and across the lands of said Daniel Valentine, along the Lake Shore, situated in the town of Genoa, County of Cayuga, in the State of New York, and being a part of Lot No. 22, whenever said Company shall have finally built their Railroad . . . and a deed conveying the same."*

Class Problem: Fee Simple or Easement (3)

Corning v. Lehigh Valley Railroad Co.:
14 A.D.2d 156; 217 N.Y.S.2d 874; 1961

- ▶ On the back of the agreement there was the following notation: *"This contract is on condition that the Rail Road Company shall have a Station at or near what is known as the 'Atwater Landing' for the accommodation of passengers and freight."*
- ▶ The agreement was recorded October 11, 1879.

SURFACE FLOW

Natural Easements:

Mileur v. McBride:
147 Ill. App. 3d 755; 498 N.E.2d 581; 1986

- ▶ Where, as alleged here, two adjoining parcels of land are situated such that surface water falling or coming onto one naturally descends upon the other, **the owner of the higher (dominant) land has a natural easement in the lower** (servient) tract to allow the surface water to flow naturally off the dominant land upon or over the servient land.
- ▶ This theory of surface-water drainage is the so-called **"civil law rule."** *Its origins can be traced back to Roman law and the Code of Napoleon*, and it has been consistently followed by the courts of Illinois for more than 100 years.

Surface Flow: "Natural Easements"

Ogburn v. Connor: 46 Cal. 346; 1873

- ▶ The prevailing doctrine appears to be that when **two fields are adjacent** and one is lower than the other, the owner of the upper field has a **natural easement** to have the water that falls upon his land flow off from the same upon the field below, which is charged with a corresponding servitude.
- ▶ when the situation of two adjoining fields is such that the water falling or collected by melting snows and the like upon one naturally descends upon the other, **it must be suffered by the lower one to be discharged upon his land...**

Surface Flow: Why should we care?? (1)

Mogle v. Moore: 16 Cal. 2d 1; 104 P.2d 785 (1940)

- ▶ The findings clearly show that **West Cucamonga creek is a natural watercourse** extending from the mouth of Cucamonga canyon southerly and southwesterly to its intersection with Comet avenue on the John G. Clock property;
- ▶ that during or prior to 1926 its **southwesterly course from that point had been obstructed and the stream waters turned south on Comet avenue** and that...

Surface Flow: Why should we care?? (2)

Mogle v. Moore: 16 Cal. 2d 1; 104 P.2d 785 (1940)

- ▶ since 1926 Comet avenue has been developed by neighboring property owners into a stream bed one mile long, extending from West Cucamonga creek to the north line of defendants' property;
- ▶ that in 1937 the waters of West Cucamonga creek followed the natural stream bed to Comet avenue, and through Comet avenue to defendants' property where their confinement into a stream of water ended; that they then spread,

Surface Flow: What is it?? Virginia

Mullins v. Greer: 226 Va. 587; 311 S.E.2d 110; 1984

- ▶ Surface water is defined as water "diffused over the surface of the ground . . . until it reaches some well defined channel."
- ▶ We apply the modified common-law rule to surface water. *Seventeen, Inc. v. Pilot Life, 215 Va. 74, 77, 205 S.E.2d 648, 651 (1974).*
- ▶ Under this rule, **surface water is a common enemy**, and each landowner may fight it off as best he can, "provided he does so reasonably and in good faith and not wantonly, unnecessarily or carelessly."

Surface Flow: Three basic Doctrines (1)

Crowell v. Marshall County:
971 N.E.2d 638; 2012 (Indiana)

- ▶ The **common-enemy doctrine** is **one of three general rules** adopted by American courts to deal with the draining of surface waters,
- ▶ the other two being the "**civil law rule**" and the "**reasonable use rule**." ... In its purest form it provides that surface water is a common enemy and, as such, **every landowner "has an unlimited and unrestricted legal privilege to deal with the surface water on his [or her] land as he [or she] pleases, regardless of the harm which he [or she] may thereby cause to others."** ...

Surface v. Stream Flow – California

Mogle v. Moore: 16 Cal. 2d 1; 104 P.2d 785 (1940)

- ▶ **Surface waters** are defined as waters falling upon and naturally spreading over lands. They may come from **seasonal rains, melting snows, swamps or springs**, or from all of them...
- ▶ **A stream** is a watercourse having a **source and terminus, banks and channel**, through which waters flow, at least periodically. Streams usually empty into other streams, lakes, or the ocean, but a stream does not lose its character as a watercourse even though it may break up and disappear...
- ▶ **Flood waters** are distinguished from surface waters by the fact that **the former have broken away from a stream**, while the latter have not yet become part of a watercourse.

Common Enemy Origins: Virginia

McGehee v. Tidewater Railroad Co.:
108 Va. 508; 62 S.E. 356; 1908

- ▶ On the other hand, by what is known as the **common law rule** ... the doctrine originated in Massachusetts in 1857, in the case of *Parks v. Newburyport, 76 Mass. 28, 10 Gray 28*.... "**surface water is regarded as a common enemy**, and every landed proprietor has the right, as a general proposition, to take any measures necessary to the protection of his property from its ravages, even if in doing so he prevents its entrance upon his land and throws it back upon a coterminous proprietor."

Civil Law Origins: Virginia

McGehee v. Tidewater Railroad Co.:
108 Va. 508; 62 S.E. 356; 1908

- Two general rules prevail in the United States with respect to surface water, the **civil law rule and the common law rule**.
- The former is thus **expressed in the Code Napoleon, sec. 640**: "**Inferior lands** are subjected, as regards those which lie higher, to receive the **waters which flow naturally therefrom to which the hand of man has not contributed**."
- The proprietor of the lower ground cannot raise a bank which shall prevent such flowing.
- The superior proprietor of the higher lands cannot do anything to increase the servitude of the lower.

The Common Enemy Doctrine – :Early Ruling Cannon v. Hargadon: 92 Mass. 106; 1865

- The right of an owner** of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, **is not restricted or modified** by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon **by rains and snows falling on its surface or flowing on to it over the surface** of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities or in other directions than they were accustomed to flow.

A common Problem: Maryland (1)

Mark Downs, Inc. v. McCormick Prop., Inc.:
51 Md. App. 171; 441 A.2d 1119; 1982

- Because it displaces valuable land and has **great destructive potential, surface water has often been regarded as a common enemy** by property owners. **No one wants it, but someone must have it.**
- This has produced a **raft of lawsuits** over the years, usually -- at least in the early years -- arising from attempts by the owners of lower lying property to stem or reverse the natural flow of the water by means of embankments or other artificial changes to their land.

The complaint: Maryland (2)

Mark Downs, Inc. v. McCormick Prop., Inc.:
51 Md. App. 171; 441 A.2d 1119; 1982

- The net effect of all this, said complainants, was to increase the amount of storm water run-off across complainants' property during tropical storm "David," thereby increasing the depth of the flood water across complainants' property.
- They asked the court to enjoin the county officials from issuing any further construction permits for property within the two watersheds, to enjoin the defendant property owners "from any further construction or improvement of any type whatsoever"

The two rules: Maryland (3)

Mark Downs, Inc. v. McCormick Prop., Inc.:
51 Md. App. 171; 441 A.2d 1119; 1982

- two schools of thought developed. One, denoted the "common law" rule, holds that ...
- ..."the ordinary right of an owner of land to make any use whatever of his land either by erections thereon or changes in the surface, ...
- ...is regarded as independent of the effect which such erections or changes may have in causing water which naturally flows off on his land to collect or flow on other land."

The two rules: Maryland (4)

Mark Downs, Inc. v. McCormick Prop., Inc.:
51 Md. App. 171; 441 A.2d 1119; 1982

- The other rule, known as the "civil law" rule, holds that
- "land on which surface water naturally flows from another tenement is regarded as subject to a servitude of receiving such flow, ...
- ...and consequently the owner has no right, by any erection or improvement to prevent the escape thereon of water from the higher land."

Reasonable Use Test: Maryland (5)

Mark Downs, Inc. v. McCormick Prop., Inc.:
51 Md. App. 171; 441 A.2d 1119; 1982

- ▶ Maryland has long (and consistently) followed the "civil law" rule; however, beginning at least in 1943 ... the Court of Appeals attempted to ameliorate some of the harshness of that rule by adopting a qualification to it. As stated in *Baer v. Board of County Commissioners*, 255 Md. 163, 168 (1969),
- ▶ "[o]nto the civil law rule our decisions have engrafted a 'reasonableness of use' test, where a balance of benefit and harm is struck in hardship cases, to make sure that the owner of the servient estate is not unreasonably denied use of his property."

Reasonable Use Test: Maryland (6)

Mark Downs, Inc. v. McCormick Prop., Inc.:
51 Md. App. 171; 441 A.2d 1119; 1982

- ▶ "The application of this [reasonableness of use] doctrine does not change the adopted [civil law] rule of law, but provides mitigation from harsh results which may be reached by a strict application thereof.
- ▶ It depends upon the facts of each particular case, is peculiarly appropriate for an equity court to follow, and, in cases where undue hardship will ensue to one or the other of property owners by a rigid application of the civil-law rule, it has the advantage of flexibility, whereby
- ▶ ... the rights of the respective owners may be equitably determined by an assessment of all the relevant factors relating to the disposition of surface waters."

Kentucky. – Surface Flow: Recent (1)

Walker v. Duba: 161 S.W.3d 348; 2004

- ▶ **Kentucky has adopted the "reasonable use" rule** which is a modification of the "common enemy" doctrine. The reasonableness of a land owner's actions is an issue of fact and the trial court's findings will not be reversed absent an abuse of discretion. We see no abuse of discretion and affirm.
- ▶ In *Klutey v. Commonwealth, Department of Highways*, Ky., 428 S.W.2d 766 (1967), **our Supreme Court switched from the "common enemy" doctrine to the rule of "reasonable use."**

Kentucky. – Surface Flow: Recent (2)

Walker v. Duba: 161 S.W.3d 348; 2004

- ▶ **The rule of "reasonable use" balances the "common enemy" doctrine (which favors the upper owner) and the "civil law" doctrine (which favors the lower owner).**
- ▶ ...Under the "reasonable use" rule, the Court views the diffused surface **water as a nuisance problem** and attempts to balance the **"reasonableness of the use"** by the upper owner against the **severity of damage** to the lower owner
- ▶ ALL CONCUR.

Benchmark N.C. Ruling – Reasonable Use: (1)

Pendergrast v. Aiken:
293 N.C. 201; 236 S.E.2d 787; 1977

- ▶ **North Carolina has traditionally adhered to a modified civil law doctrine.** *Midgett v. Highway Commission, supra*. Thus, on its face the charge of the trial judge, with emphasis on the reasonableness of the defendants' actions, is an incorrect statement of the law. Defendants, however, argue that a nuisance analysis is "useful in situations such as this case presents because it requires of the fact finder a consideration of the reasonableness of the defendant's conduct in light of all the circumstances." **In effect, defendants argue that this Court should abandon the civil law rule in favor of the rule of reasonable use. For the reasons which follow, we agree.**

Benchmark N.C. Ruling – Reasonable Use: (2)

Pendergrast v. Aiken:
293 N.C. 201; 236 S.E.2d 787; 1977

- ▶ In this jurisdiction, as already noted, **various modifications of the strict civil law doctrine have been made, case by case**, to permit the reasonable use of land. Doubtless the evolution of the law could continue in such **piecemeal fashion**. This method of change, however, has left a **legacy of contradiction and confusion** in our law regarding the drainage of surface water.
- ▶ The civil law doctrine has **historically been regarded as a species of property law**. Thus most courts have articulated the doctrine through property law concepts such as **rights, servitudes, easements, and so forth**.

Benchmark N..C. Ruling – Reasonable Use: (3)

Pendergrast v. Aiken:

293 N.C. 201; 236 S.E.2d 787; 1977

- ▶ These **property concepts are rigid and absolute** in nature and, while they are appropriate where the civil law doctrine is strictly applied, **they serve as an impediment where it becomes necessary to modify the doctrine to accommodate changing social and economic needs.**
- ▶ In an era of increasing urbanization and suburbanization, drainage of surface water most often becomes a subordinate feature of the more general problem of proper land use -- a problem acutely sensitive to social change.

Benchmark N..C. Ruling – Reasonable Use: (4)

Pendergrast v. Aiken:

293 N.C. 201; 236 S.E.2d 787; 1977

- ▶ We believe the reasonable use doctrine affords a sounder approach to the problems presented by surface water drainage. It can be applied effectively, fairly and consistently in any factual setting, *Butler v. Bruno*, supra, and thus has the capacity to accommodate changing social needs without occasioning the unpredictable disruptions in the law associated with our civil law rule.
- ▶ Other advantages of the reasonable use rule, particularly those relating to **evidentiary aspects**, are less obvious though no less important. **Under the civil law rule it is crucial to determine the "natural flow" of the surface water.** The continual process of construction and reconstruction, a hallmark of our age, has made it increasingly difficult to determine accurately how surface waters flowed "when untouched and undirected by the hand of man."

Benchmark N..C. Ruling – Reasonable Use: (5)

Pendergrast v. Aiken:

293 N.C. 201; 236 S.E.2d 787; 1977

- ▶ In sum, we think the reasonable use rule is more in line with the realities of modern life and that consistency, fairness and justice are better served through the flexibility afforded by that rule.
- ▶ Accordingly, **we now formally adopt the rule of reasonable use with respect to surface water drainage.** That rule is expressed as follows: **Each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface water is altered thereby and causes some harm to others, but liability is incurred when his harmful interference with the flow of surface waters is unreasonable and causes substantial damage.**

West Va. Adopts Reasonable use rule: (1)

Morris v. Priddy: 181 W. Va. 588; 383 S.E.2d 770; 1989

- ▶ **An increasing number of courts have come to the conclusion that both the civil and the common law rules, even as modified, are too inflexible to meet the demands of an urban society.** The development of land for commercial, industrial, and housing complexes requires alteration of the property. If this is to occur, an owner must be able to take reasonable steps to develop property without being subjected to suit. **In the development of property that is not entirely level, there is generally a need for artificial drainage to handle surface waters and, by reasonably using such devices, liability should not necessarily result.**

West Va. Adopts Reasonable use rule: (2)

Morris v. Priddy: 181 W. Va. 588; 383 S.E.2d 770; 1989

- ▶ **These considerations motivated the Connecticut Supreme Court in *Page Motor Co., Inc. v. Baker*, 182 Conn. 484, 438 A.2d 739 (1980), to abandon its modified common law theory and adopt a reasonable use test, which it phrased as follows:**
- ▶ "Generally, under the **rule of reasonable use**, the landowner, in dealing with surface water, is entitled to **take only such steps as are reasonable, in light of all the circumstances** of relative advantage to the actor and disadvantage to the adjoining landowners, as well as social utility. Ordinarily, the determination of such reasonableness is regarded as involving factual issues to be determined by the trier."

West Va. Adopts Reasonable use rule: (3)

Morris v. Priddy: 181 W. Va. 588; 383 S.E.2d 770; 1989

- ▶ **We do not believe that our cases involving the drainage of surface waters demonstrate an inflexible adherence to either the common or civil rule even as modified.** Rather, they point to the conclusion that we have approached each case on its individual facts with a view toward finding if a reasonable use was being made of the property. **It is true that we have not articulated a reasonable use standard as such, but we believe the Connecticut court's formulation in *Page Motor Co., Inc. v. Baker*, supra, is appropriate and we adopt it.**
- ▶ To the extent that *Jordan v. City of Benwood*, supra, differs, it is overruled.

Right of Access Abutter's Easement

Another type of "natural easement"

State of Ohio OTR V. Columbus:
76 Ohio St. 3d 203; 1996

- ▶ The right of access to and from a public highway or street is a **natural easement** and one of the incidents of the ownership or occupancy of land abutting thereon, and exists whether the fee to the way is in the public or in private ownership. * * *
- ▶ Regardless of whether a large tract is subdivided, **the owner or occupant is entitled to a direct outlet on the highway** for each reasonably independent economic-use unit thereof. The right of access may serve not only the personal comings and goings of the owner or occupant, but **also his reasonable use of the property for business purposes.**

Abutter's Rights: Maryland (1)

Alan Construction v. Gerding:
209 Md. 71; 120 A.2d 353; 1956

- ▶ The appellants contend that the owner of property abutting on a public highway cannot be deprived of access, except by condemnation.
- ▶ The taxpayer appellees contend, on the other hand, that an abutter's easement is subject to the dominant rights of the public, and that the mere impairment of a right of access, that does not bar all access, does not constitute a "taking" of the property.
- ▶ Both of these contentions are wide of the mark.

Abutter's Rights: Maryland (2)

Alan Construction v. Gerding:
209 Md. 71; 120 A.2d 353; 1956

- ▶ The taxpayer appellees quote, with apparent approval, from *State v. Burkett*, 119 Md. 609, 626, as follows:
- ▶ "An abutting owner has the unquestioned right to the use of the street as a means of ingress and egress, etc.,
- ▶ ... but that right is subject to such reasonable use of the street, not inconsistent with its maintenance as a public highway, as may be necessary for the public good and convenience and does not seriously impair his right."

Abutter's Rights: Maryland (3)

Alan Construction v. Gerding:
209 Md. 71; 120 A.2d 353; 1956

- ▶ It is well settled that an abutting owner has a right of ingress and egress to a public street, of which he can only be deprived by action of the public authorities in the general public interest.
- ▶ The argument of the taxpayer appellees is based on the premise that the legal status of the highway was in some way changed by the issuance of the permit, and this constituted an alteration within the meaning of the statute. We think the argument is unsound.

Abutter's Rights: Maryland (4)

Alan Construction v. Gerding:
209 Md. 71; 120 A.2d 353; 1956

- ▶ Unlike the situation in *Cityco Realty Co. v. Slaysman*, ..., where the developers retained a one-foot strip along the boundary line, the appellants concededly abut upon a public road that was dedicated to public use,
- ▶ The rights of the appellants in such highway arise by operation of law, and not by reason of any special grant from the County.
- ▶ The cutting of the curb at a specified place did not alter the established road.

Abutter's Rights: Maryland (1)

Small v. State Road Commission:
246 Md. 646; 229 A.2d 408; 1967

- Appellants own about 14 acres to the west of the line AB on the sketch made a part of this opinion. The hatched area ABC is the part of their land being condemned by the appellee (the State) for the extension (in Montgomery County) of Connecticut Avenue from University Boulevard north to Viers Mill Road.
- In addition to the hatched area (0.79 acres, in fee simple) and 0.79 acres in easements, the State is also acquiring denial of vehicular access along the line AB **which, of course, will deprive appellants' property of direct access to Connecticut Avenue.**

Abutter's Rights: Maryland (2)

Small v. State Road Commission:
246 Md. 646; 229 A.2d 408; 1967

- He went on to say that "although the origin of the right of access to public streets * * * is said to be obscure" an abutting land owner's right to an easement is well established.

Quoting Pennsylvania: Maryland (3)

Small v. State Road Commission:
246 Md. 646; 229 A.2d 408; 1967

- "However, in view of the grant of a new trial, we deem it important to note the references to Carwithan Avenue in the Commonwealth's case as a 'paper street.' Carwithan Avenue was not a 'paper street' but a legally opened street and, except for lack of grading and paving, it occupied the same status as any other legally opened street.
- To such street condemnees had the right of access even though, in fact, such street, because of its lack of grading and paving, was not readily usable.

Abutter's Easements: W. Va. Quotes ALR

Woods v. State Road Comm.:
148 W. Va. 555; 136 S.E.2d 314; 1964

- An annotation in 73 A.L.R. 2d 652 sustains the principle that a landowner's **right of access to a public street or highway may be regulated and curtailed to a reasonable degree in the promotion of the safety and general welfare of the public.** *Wood v. City of Richmond, 148 Va. 400, 138 S.E. 560*, involved a corner lot which abutted on two streets. The court held that municipal authorities acted reasonably in denying all right of access from his lot to one of the two streets.

Virginia ruling: Abutters Easement: (1)

Close v. City of Norfolk: 82 Va. Cir. 636; 2009

- Every property owner** is bound to so use and enjoy his own as **not to interfere with the general welfare of the community** in which he lives. It is the enforcement of this duty which pertains to the police power of the State, so far as the exercise of that power affects private property.
- Whatever restraints the legislature imposes upon the use and enjoyment of property within the reason and principle of this duty, the owner must submit to**, and for any inconvenience or loss which he sustains thereby he is without remedy. It is a regulation and not a taking, an exercise of police power, not of eminent domain.

Right of Access Colorado (1)

Campbell v. Summit Plaza: 192 P.3d 465; 2008

- In any event, the "public road" requirement is generally found in cases involving **the common law right of access. To show such a right, parties only need to prove their land abuts a public highway.** See *Sebree v. Bd. of County Comm'rs*, 251 Kan. 776, 785, 840 P.2d 1125, 1132 (1992)
- The common law right of access has two elements: (1) there must be a public street or highway, and (2) the persons claiming the right must own land abutting that street or highway.** *Spurling v. Kansas State Park & Res. Auth.*, 6 Kan. App. 2d 803, 804, 636 P.2d 182, 183 (1981).
- The right of access **is justified upon the grounds of necessity** and is an **appurtenant easement** which runs with the land.

▶ Vertical Extent of Property Rights

Coelum et ad inferno – Connecticut

Stanley v. Renshaw: CV960054578S 2001 Unreported

- ▶ Both counsel agree with the proposition that "In the absence of an easement or agreement, **no person has any right to erect buildings** or other structures on his own land **so that any part, however small, will extend beyond his boundaries, either above or below the surface**, and thus encroach on the adjoining premises."
- ▶ **The genesis** of a landowner's right to superjacent airspace is the common law maxim: *Cuius est solum, ejus est usque ad coelum et ad inferos* ("**to whomever the soil belongs, he also owns the sky and to the depths**"). This right to the airspace was modified only by the Federal Aviation Act, 72 Stat. 789 in 1926 and is well settled in common law.

Aviation Law – U.S. Supreme Court

United States v. Causby (Benchmark) (1)

328 U.S. 256; 66 S. Ct. 1062; 90 L. Ed. 1206; 1946

- ▶ The United States relies on the *Air Commerce Act of 1926, 44 Stat. 568, 49 U. S. C. § 171*, "...Under those statutes the United States has "complete and exclusive national sovereignty in the air space" over this country.
- ▶ "...They grant any citizen of the United States "**a public right of freedom of transit in air commerce through the navigable air space of the United States.**"
- ▶ "... And it is provided that "such navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation."

Aviation Law – U.S. Supreme Court

United States v. Causby (Benchmark) (2)

328 U.S. 256; 66 S. Ct. 1062; 90 L. Ed. 1206; 1946

- ▶ It is **ancient doctrine** that at common law ownership of the land extended to the periphery of the universe -- *Cujus est solum ejus est usque ad coelum*. But that doctrine has no place in the modern world. **The air is a public highway, as Congress has declared.** Were that not true, every transcontinental flight would subject the operator to countless trespass suits. **Common sense revolts at the idea.** To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.

Aviation Law – U.S. Supreme Court

United States v. Causby (Benchmark) (3)

328 U.S. 256; 66 S. Ct. 1062; 90 L. Ed. 1206; 1946

- ▶ **We have said that the airspace is a public highway.**
- ▶ **Yet it is obvious** that if the **landowner is to have full enjoyment of the land**, he must have exclusive control of the immediate reaches of the enveloping atmosphere. **Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run.**
- ▶ The principle is recognized when the law gives a remedy in case overhanging structures are erected on adjoining land. **The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land.**

Principle somewhat eroded: Maryland (1)

Macht v. Baltimore City:

266 Md. 602; 296 A.2d 162; 1972

- ▶ This case poses a novel question, apparently one of first impression in this State: Are there circumstances where airspace superjacent to real property may be made the subject of a separate assessment on which state and local real estate taxes can be levied?
- ▶ The hoary common law concept, *cujus est solum, ejus est usque ad coelum et ad inferos*, has been substantially eroded by technology.

Principle somewhat eroded: Maryland (2)

Macht v. Baltimore City:

266 Md. 602; 296 A.2d 162; 1972

- › For example, Maryland Code (1957, 1968 Repl. Vol.) Art. 1A, § 7, ...
- › ...while recognizing that ownership of space above lands and waters is vested in the owners of the surface,...
- › ... subjects the ownership, however, to the right of others to fly aircraft over lands and waters in any fashion which does not interfere with the use to which the surface and the airspace over it is then being put.

But still intact...: Maryland (3)

Macht v. Baltimore City:

266 Md. 602; 296 A.2d 162; 1972

- › "It is true that if a landowner is to have full enjoyment of his land, he must have exclusive control of the immediate reaches of the enveloping atmosphere.
- › Otherwise buildings could not be erected.
- › The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land."
- › As a consequence, the owner of land in fee holds all the complex elements of a single right, a bundle of sticks, if you will, which include not only the right to use the surface, but so much of the superjacent airspace as he can use, as well as the subjacent reaches below.

Airspace as separate estate: Maryland (4)

Macht v. Baltimore City:

266 Md. 602; 296 A.2d 162; 1972

- › Here, however, the question is, what are the tax consequences if he leases his airspace to another?
- › Philip Macht and Sophia Romm Macht (the Machts), as trustees, hold fee simple title to the property at 11-13 East Fayette Street in Baltimore City, fronting 24 feet on Fayette Street with a depth of approximately 113 feet, improved by a small building some 100 feet in height.
- › In 1961, Charles Street Development Corporation (the Blaustein Building) determined to erect a multi-storied office building on property immediately to the west of that now owned by the Machts.

Airspace as separate estate: Maryland (5)

Macht v. Baltimore City:

266 Md. 602; 296 A.2d 162; 1972

- › Apparently aware that the doctrine of ancient lights had been rejected by our predecessors, Cherry v. Stein, 11 Md. 1, 21-22 (1857), some positive assurance that the building's eastern face would have unimpeded access to light and air was a problem of immediate concern.
- › To that end, the Blaustein Building opened negotiations with the Machts' predecessor in title.
- › These culminated in an agreement ...leased to the Blaustein Building the airspace over 11-13 East Fayette Street above an altitude of 124 feet. The lease term was 98 years and nine months from 1 April 1961, without provision for extension or renewal.

What is the effect of statute?: Maryland (6)

Macht v. Baltimore City:

266 Md. 602; 296 A.2d 162; 1972

- › upon Code (1957, 1969 Repl. Vol.) Art. 81, § 19 (a), which provides:
- › "In valuing and assessing real estate, the land itself and the buildings or other improvements thereon shall be valued and assessed separately; . . ."
- › "In case of the separate ownership of the surface of land and of minerals or mineral rights therein, the assessing authority may, in its discretion, make separate rate assessments of the value of the surface and of such minerals or mineral rights."

What is the right?: Maryland (7)

Macht v. Baltimore City:

266 Md. 602; 296 A.2d 162; 1972

- › Although the Machts' agreement with the Blaustein Building took the form of a lease, we prefer to regard the rights of the parties as they now stand, as most closely resembling those which would exist under a negative easement for a term of years...
- › The City says that the rent reserved makes the arrangement more closely analogous to a profit a prendre, where a landowner receives payment for something taken from his land.
- › It might be argued, too, that the agreement is more closely akin to a license.

DISSENTING OPINION: Maryland (8)

Macht v. Baltimore City:
266 Md. 602; 296 A.2d 162; 1972

- As I see it, the majority leans on a broken reed in analogizing the grant of air rights to a negative easement.
- As already pointed out, the decision of this Court in *Hill v. Williams, supra*, holds that there can be no valuation or assessment separate from the valuation and assessment of the fee simple interest in a fee simple property.
- The Department did indeed attempt to make a separate valuation and assessment of "Air Rights Only"; and if the grant of air rights is an "easement," its action is prohibited by the holding in *Hill*.

Vertical Extent of Fee : Maryland (1)

Stansbury v. MDR: Development:
161 Md. App. 594; 871 A.2d 612; 2005

- Nancy R. Stansbury, appeals the decision of the Circuit Court for Anne Arundel County permitting ...("MDR"), to construct a footbridge above a submerged portion of her property, title to which she traces to a land patent. Ms. Stansbury presents three questions, which we have consolidated and rewritten as follows:

Vertical Extent of Fee : Maryland (2)

Stansbury v. MDR: Development:
161 Md. App. 594; 871 A.2d 612; 2005

- Stansbury posed the following:
- 1. As one of the sticks in the bundle of property rights, does Ms. Stansbury have rights to the superjacent airspace above her property held by land patent?
- 2. Do Ms. Stansbury's property rights in the lands beneath navigable water held by land patent and the superjacent airspace preclude a trespass with the construction of a footbridge across and through her property?

Conflict with Navigable Canal: Maryland (3)

Stansbury v. MDR: Development:
161 Md. App. 594; 871 A.2d 612; 2005

- Our primary focus is on lots 178, 179, 9A, and 10A, which, along with the other lots shown, were platted prior to the creation of the channel.
- As platted, lots 179 and 10A shared a common lot line, as do lots 178 and 9A. The common lot lines are below and approximately midway the channel.
- The depth of the channel varies with the tide, but it is stipulated to be navigable.
- The channel provides the eight lots shown above with water access to Pleasant Lake and, through the lake, to the Chesapeake Bay.

Conflict with Navigable Canal: Maryland (4)

Stansbury v. MDR: Development:
161 Md. App. 594; 871 A.2d 612; 2005



Background Information: Maryland (5)

Stansbury v. MDR: Development:
161 Md. App. 594; 871 A.2d 612; 2005

- On April 2, 1936, James Edward Stansbury, Ms. Stansbury's father, acquired fee simple title to these four lots, subject to a life estate in Mallee B. Moore, Ms. Stansbury's maternal grandmother.
- At the time, Mr. Stansbury lived on Lot 7A, and **in the mid 1950s he dredged the channel.**
- After the channel was created, a footbridge, approximately 100 to 150 feet in length, was constructed over the channel in lots 9A and 178.

Background Information: Maryland (6)

Stansbury v. MDR: Development:
161 Md. App. 594; 871 A.2d 612; 2005

- ▶ In 1997, Caldwell obtained a variance from Anne Arundel County to construct a residence on Lot 178. On April 20, 1998, Caldwell entered into an agreement with the County to treat lots 178 and 10A as one lot.
- ▶ Caldwell agreed not to construct any structure on Lot 10A, with the exception of a footbridge after obtaining all necessary Federal, State, and local permits...
- ▶ As proposed, the footbridge would extend across the channel from Lot 178 directly to Lot 10A.
- ▶ The right to construct the footbridge is at the heart of this controversy.

Background Information: Maryland (7)

Stansbury v. MDR: Development:
161 Md. App. 594; 871 A.2d 612; 2005

- ▶ In 1999, Caldwell initiated a two-count complaint against Ms. Stansbury, asserting entitlement to an easement across a portion of lot 9A in order to gain access to 10A.
- ▶ Ms. Stansbury offered evidence as to how her property, lots 179 and 9A, would be adversely affected by the construction of the footbridge.
- ▶ She also testified that a footbridge would obstruct navigation in the channel and lower the property values of the riparian owners.

Title under the Canal: Maryland (8)

Stansbury v. MDR: Development:
161 Md. App. 594; 871 A.2d 612; 2005

- ▶ John Dowling, admitted as an expert witness "in the fields of title searching, real property issues, and surveying," testified that in 1807 a land patent was issued to the land known as Grammer's Pleasant Plains.
- ▶ According to Dowling, as a result of that land patent, Ms. Stansbury is the "supreme" title holder of those portions of lots 179 and 9A beneath the channel over which the footbridge would cross.

Land Patents in Maryland: Maryland (9)

Stansbury v. MDR: Development:
161 Md. App. 594; 871 A.2d 612; 2005

- ▶ A land patent is "an instrument by which the government conveys a grant of public land to a private person"
- ▶ The language of the Charter of Maryland is archaic but clear with regard to Lord Baltimore's right to grant and regrant land as he saw fit[.]
- ▶ Land patents are "the first link in the chain of title of ownership of land in Maryland."
- ▶ Thus, "'for over 200 years, until 1862, the State (and the proprietor of the colony) patented to individuals, subject to the public rights of navigation and fishery, fee-simple title to land under water.'"

Title from Legitimate Grant: Maryland (10)

Stansbury v. MDR: Development:
161 Md. App. 594; 871 A.2d 612; 2005

- ▶ A fee simple estate "is the highest form of ownership a person can have in real property ... it has no restrictions on its use or enjoyment except those restrictions imposed by public policy for the common good."
- ▶ Title to lots 179 and 9A, now owned by Ms. Stansbury, and ...all the lots at issue, can be traced to the land patent issued in 1807.
- ▶ It is stipulated that the channel, subject to the ebb and flow of the tide, is navigable. Therefore, the respective owners of lots 178, 179, 9A, and 10A, subject to public rights of navigation and fishing, own the portions of those lots beneath the channel.

Vertical Extent of Title: Maryland (11)

Stansbury v. MDR: Development:
161 Md. App. 594; 871 A.2d 612; 2005

- ▶ ...the land patent establishes "the best title possible," and, the owners hold "supreme" title to this property.
- ▶ In Maryland, "the owner of land in fee **holds all of the complex elements of a single right, a bundle of sticks**, if you will, which include not only the right to use the surface,...
- ▶ ... **but so much of the superjacent airspace as he can use, as well as the subaqueous reaches below."**
- ▶ Ms. Stansbury has a property interest in the air space above the subaqueous land of which she is the fee simple owner.

Vertical Extent of Title: Maryland (12)

Stansbury v. MDR: Development:
161 Md. App. 594; 871 A.2d 612; 2005

- ▶ While there may be some limitations on the use of airspace, it is obvious that "if a landowner is to have full enjoyment of his land, he must have exclusive control of the immediate reaches of the enveloping atmosphere."
- ▶ Accordingly, Ms. Stansbury is entitled to full enjoyment of her subaqueous land, which includes the superadjacent airspace so long as she does not impede the public's right to "fishing and navigation."
- ▶ Absent an agreement or a legally recognized nonpossessory interest in Ms. Stansbury's property, MDR has only the rights of a member of the general public.

Conclusion: Maryland (13)

Stansbury v. MDR: Development:
161 Md. App. 594; 871 A.2d 612; 2005

- ▶ A declaratory judgment should be entered to the effect that, subject to public rights of navigation and fishing,
- ▶ Ms. Stansbury owns in fee simple those portions of lots 9A and 179 beneath the channel;
- ▶ that MDR, subject to public rights of navigation and fishing, owns in fee simple those portions of lots 10A and 178 beneath the channel; and that MDR, ...
- ▶ ... is entitled to an easement by necessity over either lot 9A or 179, or both, as reasonably necessary to establish pedestrian access by a footbridge between Lot 178 and Lot 10A.

Nature of Property Ownership: Maryland (1)

Annapolis v. Waterman:
357 Md. 484; 745 A.2d 1000; 2000

- ▶ After the close of the Revolutionary War, the ownership of property in this country has frequently been referred to as "allodial" in nature
- ▶ In its strict sense, "allodium" means land owned absolutely, and not subject to any rent, service, or other tenurial right of an overlord; however, it has been, ...
- ▶ ...and is, uniformly recognized throughout this country that the ownership of property is subject to the rights of government to tax the property, to regulate reasonably its use and enjoyment under the police power of the States, and to take the same, upon payment of the value thereof, when needed for a public purpose.

Restrictions v. "Takings": Maryland (2)

Annapolis v. Waterman:
357 Md. 484; 745 A.2d 1000; 2000

- ▶ It is an accurate statement to say that every restriction upon the use and enjoyment of property is a "taking" to the extent of such restriction; but every "taking" is not a "taking" in a constitutional sense for which compensation need be paid.
- ▶ It is well settled that conditions may be imposed by a municipal planning commission in connection with the approval of a proposed subdivision map or plan.

Vesting by Existing Ordinance: Maryland (3)

Annapolis v. Waterman:
357 Md. 484; 745 A.2d 1000; 2000

- ▶ "Vesting" occurs when property owners have made significant steps in the development of a project prior to the enactment of statutes that prohibit what formerly was permitted.
- ▶ Even in Maryland, where the concept seems to be limited to situations in which some progress under the prior statutes is required, ...
- ▶ ...we have recognized the potential for unconstitutional takings to occur, even though a property owner might be permitted an economically viable use under the new statute.

Restrictions v. "Takings": Maryland (4)

Annapolis v. Waterman:
357 Md. 484; 745 A.2d 1000; 2000

- ▶ In Maryland it is established that in order to obtain a "vested right" in the existing zoning use which will be constitutionally protected against a subsequent change in the zoning ordinance prohibiting or limiting that use, the owner must
- ▶ (1) obtain a permit or occupancy certificate where required by the applicable ordinance and
- ▶ (2) must proceed under that permit or certificate to exercise it on the land involved so that the neighborhood may be advised that the land is being devoted to that use.

Taking & Compensation: Maryland (5)

Annapolis v. Waterman:

357 Md. 484; 745 A.2d 1000; 2000

- ▶ In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631 (1978), the United States Supreme Court, ...opined: "this Court, quite simply, ...
- ▶ ...has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."

Taking & Compensation: Maryland (6)

Annapolis v. Waterman:

357 Md. 484; 745 A.2d 1000; 2000

- ▶ In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, ... (1999)
- ▶ Almost from the inception of our regulatory takings doctrine, we have held that whether a regulation of property goes so far that "there must be an exercise of eminent domain and compensation to sustain the act ...
- ▶ depends upon the particular facts." Consistent with this understanding, we have described determinations of liability in regulatory takings cases as "'essentially ad hoc, factual inquiries,'" **requiring "complex factual assessments of the purposes and economic effects of government actions."**

Taking & Minerals: Maryland (7)

Annapolis v. Waterman:

357 Md. 484; 745 A.2d 1000; 2000

- ▶ The more recent case of *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987), involved a Pennsylvania statute that required companies mining subsurface coal to leave a certain portion of the coal in place to support the surface above, avoiding subsidence problems.
- ▶ The statute required the companies to leave in place 27 million tons of coal.
- ▶ The companies argued, in a takings context, that in determining whether there was any remaining viable economic use in the property only that 27 million tons of coal should be considered as the property.

Mineral rights like Zoning?: Maryland (8)

Annapolis v. Waterman:

357 Md. 484; 745 A.2d 1000; 2000

- ▶ The 27 million tons of coal do not constitute a separate segment of property for takings law purposes.
- ▶ Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property.
- ▶ A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area as readily as the requirement that coal pillars be left in place.

Mineral rights like Zoning?: Maryland (9)

Annapolis v. Waterman:

357 Md. 484; 745 A.2d 1000; 2000

- ▶ Similarly, under petitioners' theory one could always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes.
- ▶ There is no basis for treating the less than 2% of petitioners' coal as a separate parcel of property.

Regulation of Wetlands?: Maryland (9)

Annapolis v. Waterman:

357 Md. 484; 745 A.2d 1000; 2000

- ▶ *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993)
- ▶ If that were true, the Corps' protection of wetlands via a permit system would, ipso facto, constitute a taking in every case where it exercises its statutory authority.");
- ▶ ("The denial of one traditional property right does not always amount to a taking.
- ▶ At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."

Air Rights: North Carolina

Cheape v. Chapel Hill: (1)

320 N.C. 549; 359 S.E.2d 792; 1987

- At common law, the holder of a fee simple also owned the earth beneath and the air above -- "*cujus est solum, ejus usque ad coelum et ad inferos*." *Jones v. Loan Association*, 252 N.C. 626, 637, 114 S.E. 2d 638, 646 (1960). This law applies in North Carolina. See N.C.G.S. § 4-1 (1986).
- Plaintiffs ... **argue that** absent specific authority, **the holder of a fee simple may not divide his fee horizontally.**
- Nevertheless, they cite no law requiring such specific authority.** It appears to be the general rule that **absent some specific restraint, the holder of a fee simple may divide his fee in any manner he or she chooses.**

Air Rights: North Carolina

Cheape v. Chapel Hill: (2)

320 N.C. 549; 359 S.E.2d 792; 1987

- Plaintiffs also argue** that *N.C.G.S. § 63-12* positively **prohibits a conveyance of air rights** independent of the land beneath. That statute provides, "The ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in *G.S. 63-13*." *N.C.G.S. § 63-12* (1985). However, **the purpose of the statute** was to **subject the common law rights recognized and described therein to the right of flight** established in N.C.G.S. § 63-13,
- ... **not to prohibit a conveyance of air rights independent of the land beneath.**

Air Rights: New Jersey: (1)

Slotoroff v. Nassau Associates:

178 N.J. Super. 292; 428 A.2d 956; 1980

- The ancient rule of common law, giving a landowner exclusive rights in the column of air above his head, **was based upon a maxim of Roman law, *cujus est solum ejus usque ad coelum*.** The old rule and its modern application are discussed in *6A American Law of Property*, § 28.4 at 15-16 (1954):

Air Rights: New Jersey: (2)

Slotoroff v. Nassau Associates:

178 N.J. Super. 292; 428 A.2d 956; 1980

- ... If the *usque ad coelum* maxim ever gave or was intended to give **possessory rights above the space of actual or potential user**, it clearly has no such effect today. **Although the surface occupant is variously described as possessing usufructuary rights in the airspace**, possessory rights in the zone of actual user, or possessory rights in the entire air column, subject to certain usufructuary rights of others, he is generally limited to a recovery of such losses as result from interferences with his enjoyment of the land or his present or potential use of the airspace.

Air Rights: New York: (1)

MacMillan v. CF Rex & Assoc:

56 N.Y.2d 386; 437 N.E.2d 1134; 452 N.Y.S.2d 377; 1982

- Moreover, **air rights, at the heart of the concept of zoning** lot merger, have historically been conceived as one of the **bundle of rights associated with ownership of the land** rather than with ownership of the structures erected on the land.
- Air rights are incident to the ownership of the surface property** -- the right of one who owns land to utilize the space above it. This right has been recognized as an inherent attribute of the ownership of land since the earliest times as reflected in the maxim, "[cujus] est solum, ejus est usque ad coelum et ad inferos" ["to whomsoever the soil belongs, he owns also to the sky and to the depths"] ...

Air Rights: New York: (2)

MacMillan v. CF Rex & Assoc:

56 N.Y.2d 386; 437 N.E.2d 1134; 452 N.Y.S.2d 377; 1982

- ... (*Butler v. Frontier Tel. Co.*, 186 NY 486, 491; 2 *Blackstone's Comm*, p 18; see Ball, *Vertical Extent of Ownership in Land*, 76 U of Pa L Rev 631 **in which the maxim is attributed to the early 14th century scholar Cino da Pistola**).
- The assertion of plaintiff that air rights owe their origin to the New York City Zoning Resolution must be rejected. The zoning resolution provides sophisticated procedures to facilitate the functional transfer of air rights. In so doing it treats of property rights long antedating the enactment of the resolution.

Connecticut – vertical extent of ownership

Stanley v. Renshaw: CV960054578S (unreported, 2002)

- Both counsel agree with the proposition that "**In the absence of an easement or agreement**, no person has any right to erect buildings or other structures on his own land so that **any part, however small, will extend beyond his boundaries, either above or below the surface**, and thus encroach on the adjoining premises." *7 Am.Jur.2d, Section 119.*
- The **genesis of a landowner's right** to superjacent airspace is the common law maxim: **Cuius est solum, ejus est usque ad coelum et ad inferos** ("to whomever the soil belongs, he also owns the sky and to the depths"). This right to the airspace was modified only by the *Federal Aviation Act, 72 Stat. 789 in 1926* and is well settled in common law.

Virginia: Rights under public Rd. (1)

Anderson v. Stuarts Draft: 197 Va. 36; 87 S.E.2d 756; 1955

- To like effect is *Psota v. Sherman County, 124 Neb. 154, 158, 245 N.W. 405, 406*, holding, in accord with *29 C.J. 544*, that on the laying out of a highway the public acquire not only the right of way,
- but also the **powers and privileges incident to that right**, including the **right to raise or lower the surface** in order to make and keep the way safe and convenient for public travel.

Virginia: Rights under public Rd. (2)

Anderson v. Stuarts Draft: 197 Va. 36; 87 S.E.2d 756; 1955

- We are in accord with the view expressed in those two cases that upon acquiring a right of way for a road **the public right is not narrowly limited to passing over the surface** as then made
- but **extends to making reasonable improvements in the grade to make the road safer and more convenient** for public travel by the methods in common use at the time of the improvement; but we limit our approval of their holdings to the facts of the present case where only rights in the subjacent soil are involved.

Virginia: Rights under public Rd. (3)

Anderson v. Stuarts Draft: 197 Va. 36; 87 S.E.2d 756; 1955

- The **public easement** is coextensive with the limits of the highway and the public right **is not limited to the surface of the highway but extends both upward and downward** for a distance sufficient to accommodate, as well as to protect, all proper uses to which the way is subject. Where the owner of land dedicates it to the public for a road, he impliedly grants the attendant or incidental right to make such use of it as shall suitably fit it for travel.

Virginia: Rights under public Rd. (4)

Anderson v. Stuarts Draft: 197 Va. 36; 87 S.E.2d 756; 1955

- The rights of the owner of the underlying fee are always subordinate to the rights of the public and **may grow less as the public needs increase**. With this exception such owner retains all that is not needed for public use. **Mineral deposits and quarries within the limits of the highway belong to the owner** of the fee and he may work the mines or quarry the stone so long as he does not interfere with the public use of the highway or cause the road to subside.
- He has and **may convey to another the right to lay a pipe line under the bed of the road**, provided he does not thereby obstruct the road.

Change in Road Grading: Maryland (1)

Redemptorists v. Wenig: 79 Md. 348; 29 A. 667; 1894

- The deed, after describing the land by metes and bounds, containing forty acres more or less, has the following clause or reservation:
- "Clear of a road thirty feet wide running from the end of forty-five perches on the sixth line," etc., "and also clear of the one-half of a road thirty feet wide along the second line," etc., "which roads are for the use in common of the parties to this deed, their heirs and assigns."

Significant Cuts and Fills: Maryland (2)

Redemptorists v. Wenig: 79 Md. 348; 29 A. 667; 1894

- › For the purpose of making the road described in the Ware deed a more convenient and available way to the thirty-seven acres bought of him, and to its cemetery, the appellant, without the leave of the appellee, and against his remonstrance, proceeded to alter and change the grade of the road.
- › And in so grading it, the road is in some places elevated above the surface, and in others it is cut down to the depth of eight feet.



Grading causes flooding: Maryland (3)

Redemptorists v. Wenig: 79 Md. 348; 29 A. 667; 1894

- › The effect of these alterations, by which it was changed from a surface road adapted and conforming to the natural rise and fall of the land, to a road with deep cuts in one part and fills in other parts, ...
- › ...was not only to divide and separate the defendant's land, and to interfere with his accustomed and convenient use of the same, ...
- › ...but also to collect the surface water falling during heavy rains, and to discharge the same in great volumes on and over the appellee's land,



What was intent of parties?: Maryland (4)

Redemptorists v. Wenig: 79 Md. 348; 29 A. 667; 1894

- › In its defence to the action the appellant contends, and so asked the Court to instruct the jury, that under the Ware deed the appellee was entitled to a mere easement in the road in question, and that the fee in the bed of the road was reserved by Ware, the grantor.
- › This deed, we agree, is to be construed according to the intention of the parties, and this intention is to be ascertained from the language and terms of the deed itself



This is Private Road...: Maryland (5)

Redemptorists v. Wenig: 79 Md. 348; 29 A. 667; 1894

- › The appellant is, of course, entitled to the reasonable and proper enjoyment of this way for the purposes for which it was reserved, ...
- › ...but all other rights and benefits consistent with such easement belong to the appellee as owner of the soil.
- › As purchaser of the remainder of the Ware tract, it acquired all the rights appurtenant to this parcel of land, that is to say, the use of the road to and from said parcel of land.
- › But being a private road, the appellant has no right to use it for the purposes and benefit of another tract of land, to which the right of way is not appurtenant.



Conclusion: Maryland (6)

Redemptorists v. Wenig: 79 Md. 348; 29 A. 667; 1894

- › the appellant was, we agree, entitled to the reasonable use of the road to and from the thirty-seven acres purchased of Ware, ...
- › ...and had the right to make such repairs as were necessary; ...
- › ...but it had no right to grade it by elevating the road in some places three and four feet above the surface, and by cuts in others to the depth of eight feet, ...
- › ...even though such grading was done with due care so far as making it a more available and convenient way.



Utilities vs. Public travel: Maryland (1)

State v. Potomac Edison:
166 Md. 138; 170 A. 568; 1934

- › It was a question for the jury whether a power company was negligent in maintaining a guy wire attached to a pole at a height of eleven feet and five inches above the surface of a highway, so that the wire came in contact with a well-drilling machine and derrick, permanently mounted on a truck which was travelling on the highway, with the result that the pole fell, so as to break the transmission wires carried by the pole, and to charge the guy wire, resulting in the death of an attendant on the truck.



Utilities vs. Public travel: Maryland (2)

State v. Potomac Edison:
166 Md. 138; 170 A. 568; 1934

- ▶ Joseph M. Hoffman, in connection with his drilling work, operated a well-drilling machine and derrick, permanently mounted on a truck.
- ▶ In moving the truck from place to place the derrick folded forward on a hinge or hinges, and projected from the rear of the truck at a depressed angle over its hood, so that, when folded, the derrick sloped upward from the hood to its highest point, which was at the rear end of the truck.
- ▶ Its **highest point, when so folded, was less than thirteen feet four inches above the surface** on which the truck wheels rested.

What will the Surveyor Locate?: Maryland (3)

State v. Potomac Edison:
166 Md. 138; 170 A. 568; 1934

- ▶ The ground in which the tree stood was lower than the surface of the road at its crown, so that, ...
- ▶ ...while the point at which the guy wire was attached to the tree was eight feet one inch above the surface of the ground in which it stood, it was but six feet eight inches above the level of a horizontal plane in which lay the highest point of the surface of the road.
- ▶ The guy wire was attached to the pole at a point twenty-one feet seven inches from the ground, and the pole was thirty-nine feet from the tree.

What is a Public Highway for?: Maryland (4)

State v. Potomac Edison:
166 Md. 138; 170 A. 568; 1934

- ▶ A highway is a public road, street or way, dedicated to every lawful and reasonable use to which it may be put by the public at large for purposes of transportation or travel.
- ▶ Such a use is usually held to be lawful and reasonable so long as it does not interfere with or endanger others lawfully and reasonably engaged in the use of the way.
- ▶ The question as to what is a lawful and reasonable use is in the nature of things naturally affected by changes in methods of transportation, and by the needs of those who must be served by the ways.

What is a Public Highway for?: Maryland (5)

State v. Potomac Edison:
166 Md. 138; 170 A. 568; 1934

- ▶ So, in rural territory, such ways must be used for the passage of traction engines, threshers and well-drilling machines, ...
- ▶ ...for in no other convenient or practical way could persons in such areas secure the mechanical utilities essential to the reasonable and convenient use of their respective properties, ...
- ▶ ...and the use of the public highways for the passage of such engines and machines in a reasonably careful and prudent manner is neither unreasonable nor unlawful.

Uses associated with highways: Maryland (6)

State v. Potomac Edison:
166 Md. 138; 170 A. 568; 1934

- ▶ it has been held that corporations or others who have secured permission to obstruct any portion of a highway by the erection of permanent fixtures, such as poles and wires, must so place them ...
- ▶ ...as not to interfere with or endanger others who may be in the lawful and reasonable use of such ways for purposes of travel or transportation, which may include moving such vehicles as traction engines and well-drilling machines.

Uses associated with highways: Maryland (7)

State v. Potomac Edison:
166 Md. 138; 170 A. 568; 1934

- ▶ the fundamental rule to be kept in mind is that the use of a public road for the maintenance of telegraph poles and similar structures is ...
- ▶ ...subordinate to the purposes of public travel for which the road is primarily intended.
- ▶ The statute authorizing corporations to construct their lines along and upon the highways **and across the bridges and waters of the state**, by the erection of the necessary fixtures, provides that they 'shall not be so constructed as to incommode injuriously the public use of said postal roads or postal routes, roads, highways and bridges,

Reservation of right to Light: Maryland (1)

Main v. Hagerstown: 132 Md. 336; 104 A. 410; 1918

- › *And the said Moderator and Commissioners for themselves and their successors in the office further covenant, grant, promise and agree to and with the said George Brumbaugh, his heirs and assigns, that they the said Moderator and Commissioners and their successors will secure to the said George Brumbaugh, his heirs and assigns, all the benefits and advantages of the light of the doors and windows in the brick buildings which the said George Brumbaugh has erected on the portion of the lot or parcel of ground hereby bargained and sold and which are on that side of said buildings which adjoins the said market space.*

Reservation of right to Light: Maryland (2)

Main v. Hagerstown: 132 Md. 336; 104 A. 410; 1918

- › *And the said Moderator and Commissioners for themselves and their successors further covenant, grant, promise and agree to and with the said George Brumbaugh, his heirs and assigns that no house, building, edifice or superstructure of any description whatever shall be erected on the market space aforesaid within ten feet of the houses which have been erected by the said George Brumbaugh on the portion of the aforesaid lot of ground hereby bargained and sold to the aforesaid George Brumbaugh.*

Reservation of right to Light: Maryland (3)

Main v. Hagerstown: 132 Md. 336; 104 A. 410; 1918

- › *And that the said space of ten feet shall be forever kept open and clear and free from all obstructions for the better securing to the said George Brumbaugh, his heirs and assigns, the benefits and advantages of the light to the aforesaid doors and windows."*

Reservation of right to Light: Maryland (4)

Main v. Hagerstown: 132 Md. 336; 104 A. 410; 1918

- › ...complains that the Mayor and Council of Hagerstown have caused to be placed in the ten-foot open space certain "trestles, timber, boards and structures of wood and other articles" used by those attending the market.
- › The bill then charges that the articles mentioned are obstructions upon the ten feet, and constitute a breach of the covenant...
- › These recitals have been made in some detail for the reason that it is nowhere alleged or suggested in the bill, that the light of the building belonging to Mr. Main has been interfered with...

Reservation of right to Light: Maryland (5)

Main v. Hagerstown: 132 Md. 336; 104 A. 410; 1918

- › The majority opinion says that--"The rule is well established that if the covenant benefits the land to which it relates, and enhances its value, the easement created by it becomes appurtenant to the land and passes with it,"
- › As a deduction from all the cases, the general rule is laid down as follows ...
- › "...Equity will enjoin any obstruction of an easement of light and air which will materially impair the complainant's enjoyment of his property

Reservation of right to Light: Maryland (6)

Main v. Hagerstown: 132 Md. 336; 104 A. 410; 1918

- › What are the facts as they appear in the present case? The plaintiff has six windows and a door on the first floor of his west wall, and the same number of windows on his second and third floors, and one small window opening into the basement.
- › The exhibits filed in the case do not show that the open space between the market house and Mr. Main's warehouse is of attractive appearance, or has been beautified to any large extent by the town authorities of Hagerstown.
- › But the question is, whether the light of the plaintiff has been obstructed ...

Air Rights: North Carolina

Piedmont Triad v. Lamb: 564 S.E.2d 71 (2002)

- Under N.C. Gen.Stat. § 40A-2(7), property is defined as "any right, title, or interest in land, including leases and options to buy or sell.
- 'Property' also includes rights of access, rights-of-way, easements, water rights, **air rights**, and any other privilege or appurtenance in or to the possession, use, and enjoyment of land."

Effect of Constructive Notice On Existing Easements

How Durable is an Easement?: Maryland (1)

Kiler v. Beam: 74 Md. App. 636; 539 A.2d 1138; 1988

- Did appellant establish a right-of-way by prescription over appellee's property?
- Successive members of appellant's family have used this roadway running across appellee's property once or twice a year since 1940 to get to their land.
- In 1968, appellee's son placed a junk car across the roadway
- the court must preliminarily decide whether appellant has met his burden of establishing the existence of a prescriptive easement by 1964 when appellee purchased the land.

Constructive Notice & Easement: Maryland (2)

Kiler v. Beam: 74 Md. App. 636; 539 A.2d 1138; 1988

- Maryland courts have not had occasion to decide whether a prescriptive easement is extinguished by the subsequent purchase of the servient estate by a purchaser without either actual or constructive notice.
- Nonetheless, treatises and the overwhelming majority of case law in other jurisdictions agree that ...
- "...an easement is not binding on a subsequent bona fide purchaser of the servient estate if he purchases without notice, either actual or constructive, of the easement."

Constructive Notice & Easement: Maryland (3)

Kiler v. Beam: 74 Md. App. 636; 539 A.2d 1138; 1988

- In Slear v. Jankiewicz, 189 Md. 18, 25, 54 A.2d 137 (1947)*, ...the Court held that an easement by implication is not automatically extinguished by the subsequent purchase of the servient estate.
- ...in *Renner v. Johnson, 2 Ohio St.2d 195, 207 N.E.2d 751 (1965)*, the owners of a dominant parcel sought to enjoin the termination of their water and sewer lines by the owners of the servient parcel.
- The Court concluded that an equitable easement is not enforceable against a bona fide purchaser for value who has no actual or constructive notice of the easement.

Inquiry Notice & Easement: Maryland (4)

Kiler v. Beam: 74 Md. App. 636; 539 A.2d 1138; 1988

- "In determining whether a purchaser had notice of any prior equities or unrecorded interests, so as to preclude him from being entitled to protection as a bona fide purchaser, ...
- ...the rule is that if he had knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry, he will be presumed to have made such inquiry ...
- ...and will be charged with notice of all facts which such an investigation would in all probability have disclosed if it had been properly pursued.

Inquiry Notice & Easement: Maryland (5)

Kiler v. Beam: 74 Md. App. 636; 539 A.2d 1138; 1988

- › A purchaser cannot fail to investigate when the propriety of the investigation is naturally suggested by circumstances known to him.
- › If he neglects to make such inquiry, he will be guilty of bad faith and must suffer from his neglect.
- › That which is sufficient to excite inquiry is notice of such facts as would lead an ordinarily prudent man to make an examination."



Property Rights: North Carolina ☺

Steel Creek Development v. James:
294 S.E.2d 23 (1982)

- › An Irish lawyer named Sullivan once argued an air rights case before the highest court of Great Britain.
- › A **member of the court asked** during oral argument: "Mr. Sullivan, **have your clients not heard of the maxim, *cujus est solum, ejus est usque ad coelum et ad inferos?***"
- › Sullivan responded: "**My lords, the peasants of Northern Ireland speak of little else.**"

