IN THE

Supreme Court of Virginia

RECORD NO. 131590

SWORDS CREEK LAND PARTNERSHIP,

Appellant,

v.

DOLLIE BELCHER, *et al.*
and
PAUL RICHARDSON, *et al.*,

Appellees.

OPENING BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The circuit court erred in concluding that the deed of February 7, 1887 granting "coal and other things" with covenants of general warranty and quiet possession did not include all of the property rights to the CBM that remains within the seam of coal until the time of CBM extraction and production. JA 413–15 ¶¶ 1–11; JA 419–20 ¶¶ 36–42; JA 759–61 ¶¶ 1–11; JA 765–66 ¶¶ 36–42.

2. The circuit court erred in concluding that Swords Creek's ownership of the coal and appurtenant rights do not include the right to control extraction and recovery of CBM by a lease in consideration for the payment of a royalty. JA 415–18 ¶¶ 12–29; JA 419–20 ¶¶ 36–42; JA 761–64 ¶¶ 12–29; JA 765–66 ¶¶ 36–42.

3. The circuit court erred in concluding that the Surface Owners' claim to all royalties that result from the production of CBM exclusively from Swords Creek's coal in which they surrendered all rights of access does not result in their unjust enrichment. JA 418–19 ¶¶ 30–35; JA 764–65 ¶¶ 30–35.

INTRODUCTION

Coal bed methane ("CBM") is a natural gas contained within and produced from seams of coal. An explosive gas, CBM was a regarded solely as a liability in 1887 when the coal severance deed at issue was executed. Now a valuable energy source, its ownership is hotly disputed. Not disputed, though, is that appellant Swords Creek Land Partnership ("Swords Creek") owns the coal seams that contain the CBM in question. JA 400, 741. Also not disputed is that no one else can access the CBM and extract and recover it, without Swords Creek's permission. *See* JA 108, 239, 513, 605.

The predecessor to CNX Gas Company, LLC ("CNX") wanted to access the coal seams and capture the CBM. Swords Creek agreed in exchange for payment of a royalty pursuant to a lease. JA 107–26, 512–31. Those royalties are now held in escrow by the Virginia Gas and Oil Board ("VGOB"). Nearly 20 years after the lease's execution, when the escrowed royalties became substantial, the appellees (the "Surface Owners") filed suit claiming they are entitled to the royalties. JA 1–5, 428–31. The Surface Owners claim ownership of the CBM in Swords Creek's coal as well as all the escrowed royalties, less account fees. JA 4–5, 198, 431.

Relying on *Harrison-Wyatt v. Ratliff*, 267 Va. 549, 593 S.E.2d 234 (2004), the circuit court held for the Surface Owners. The circuit court, however, failed to recognize that *Harrison-Wyatt* concerned a different property right than those presently at issue. In *Harrison-Wyatt*, the CBM migrated from the coal and the question was who owned the fugitive CBM. Here, the CBM is within the coal. The property rights at issue are Swords Creek's ownership of the coal seams that contain the CBM and its exclusive right to access those coal seams. These rights allow Swords Creek to exclude others from recovering the CBM and to receive payment in exchange for allowing access.

The circuit court's judgment is erroneous and should be reversed. Swords Creek owns the coal that contains the CBM and maintains the exclusive right to access the coal seams. The royalties are the price CNX agreed to pay for permission to access those seams. The circuit court's judgment nullifies those rights. The judgment also would discourage extraction of CBM in Southwest Virginia if allowed to stand. If owners of coal seams cannot be compensated, they would have no reason to allow drilling into their coal seams. That surely cannot be the consequence the Court intended in *Harrison-Wyatt.*

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW

In 2011, the Surface Owners filed two separate actions[1] in the Russell County Circuit Court ("circuit court") pursuant to the Virginia Declaratory Judgment Act, Va. Code § 8.01-184, in their capacity as owners of the "tracts of land and all of the surface rights thereto." JA 2, 428–29. The Surface Owners sought a declaration of their ownership of CBM and the production royalties from its extraction and sale. JA 4–5, 431.

Both actions were filed against Swords Creek as the owner of the coal which is the source of the CBM in question. Swords Creek acquired the coal under a deed executed in February 1887 which conveyed the coal, timber, extensive appurtenant rights, and "other things" in the subject property. JA 16–18, 437–38. The royalties that the Surface Owners seek are paid under a lease that Swords Creek entered in 1991, two decades before the Surface Owners filed the instant actions.

Swords Creek filed counterclaims asserting its rights to the coal and CBM in question. JA 203–20; *Richardson* Second Am. Countercl. (Oct. 25, 2012).

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[1] The *Belcher* action was filed on behalf of Dollie Belcher, Doris Dye, and Ruby Lawson. The *Richardson* action was filed on behalf of Paul Eugene Richardson, Mae Richardson, and Ruth Richardson. Although not formally consolidated, the actions proceeded as one in the circuit court.

For two years the parties challenged each others' claims by demurrrers and other motions. Twice, Swords Creek sought leave to amend its counterclaims to plead facts in support of its legal theories that it was conveyed the CBM under the 1887 deed and that Swords Creek controlled CBM production by reason of its exclusive ownership of the coal seams from which all CBM has been produced. The circuit court granted those motions in recognition that, "this is an important case and it sets a precedent[.]" JA 904:22.

The circuit court ultimately sustained the Surface Owners' demurrer to each count of Swords Creek's second amended counterclaim, finding that the Surface Owners "have taken no action to affect the Defendant's coal or coal rights" and incorporating its prior opinion letter of October 4, 2012. JA 389–90. The circuit court entered summary judgment for the Surface Owners on their claims. JA 406–09, 746–48.[2]

Swords Creek filed exceptions to each Final Order as it had to each of the previous orders. JA 413–22; 759–68. Swords Creek filed its joint notice of appeal for both cases with the clerk of the circuit court on September 24, 2013. JA 423–24, 769–70.

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[2] Both Final Orders adopted the findings of the prior orders and opinion letters dated May 2, 2013 and October 4, 2012. JA 407, 747.

STATEMENT OF FACTS

I. The Severance Deed

In 1887 the Surface Owners' predecessors severed three interests in real property from their fee simple estate: (1) the coal, (2) the timber, and (3) the "privileges hereinafter specified." JA 16–18, 434–36. Those privileges included the property rights necessary "to enter on, over, upon, and through said tract of land for the purpose of digging, mining, or otherwise securing the coal and other things in and on said tract of land . . . and removing the same from and off said lands." JA 18, 436. The Surface Owners' predecessor-in-interest conveyed:

> all of the coal in, upon or underlying a certain tract of land and the timber and privileges hereinafter specified as appurtenant to said tract below described . . . to enter on, over, upon and through said tract of land for the purpose of digging, mining, or otherwise securing the coal and other things in and on said tract of land hereinbefore specified, and removing same from off said land . . . [Grantors] do covenant that they will warrant generally the property hereby conveyed . . . that the [Grantees] shall have quiet possession of the said property, free from incumbrances (sic) . . . .

Id.

The severance deed confirmed a prior deed of December 9, 1886, which obligated the parties to convey the property but recited fewer acres than conveyed by the subsequent deed. *See* JA 221–22, 437–38.

Employing language that differed from the earlier deed, the severance deed included the words "other things" among the appurtenant rights conveyed.

Both deeds conveyed the property with general warranty of title and with a covenant of quiet possession. However, the severance deed enlarged the covenants by adding the phrase "free from incumbrances." JA 16–18, 434–36. Further, no interest was retained by the grantors in the property described and conveyed by the deed (except the reservation of a small amount of timber and the domestic use of coal during the lives of the grantors). *Id.*

Significantly, the grantors reserved to themselves no easement of any kind in their favor in the coal estate. CBM is neither identified explicitly in the deed, nor is it encompassed implicitly by generic words such as "gas" or "minerals." Except for the grantee's express right to dig, mine, secure and remove from the property the "coal and other things," the existence of CBM is unidentified and rights of either party to it are unspecified by the severance deed. Nor did the grantors retain any right to CBM in the coal seams or any right to access CBM in the coal seams.

II. Extraction and Recovery of CBM

Swords Creek owns the property and rights conveyed by the 1887

severance deed. JA 16-18, 434-36. In 1991, Swords Creek entered a lease authorizing CNX's predecessor to extract and recover CBM from Swords Creek's coal. JA 107–26, 512–31. The lease terms specifically granted CNX the right to drill wells into Swords Creek's coal seam. In addition, the lease authorized CNX to "inject under pressure air, gas, water, brine and other fluids from any source into the subsurface strata" (i.e. "frac") to promote the flow of CBM through the seam into the well. JA 108, 513. Once drilled, the CBM wells may remain in the coal indefinitely. JA 109, 514.

In comparison, CNX never entered into a lease with the Surface Owners.

The lawful right to enter and remain in the coal seam to recover the CBM was essential to CNX. Accordingly, Swords Creek leased its property rights in its coal seam without limitation. JA 119–20, 524–25. When it entered the lease in 1991, no judicial decision regarding the property rights in CBM had been made by any Virginia court. Therefore, Swords Creek only leased what rights it had to the CBM in its coal, in effect, quit-claiming its interest in the gas. *Id.*

In return for the aforementioned rights, Swords Creek accepted consideration in the form of a delay rental and a royalty of one-eighth of the

value of the CBM recovered and sold. JA 110–11, 515–16. The delay rental was designed to promote the drilling of wells to produce the CBM, but is off-set by the payment of the production royalty which constitutes the principal consideration to Swords Creek under the lease. *Id.* The royalty represents the complete compensation to Swords Creek both for its ownership of the CBM as well as the right to enter and extract from its coal seams as the reservoir from which all CBM has been recovered.

Pursuant to the lease, six wells have been drilled in units in which Swords Creek's coal seams are the source of the CBM at issue. *See* JA 84, 490 (Unit FF-35); JA 70, 476 (Unit FF-34); JA 58 (Unit FF-33); JA 31 (Unit EE-33); JA 44, 447 (Unit EE-34); JA 461 (Unit EE-35). The recovery of the CBM at issue has occurred by fracturing Swords Creek's coal seams. JA 799:6–12.

III. The Gas Act

CBM extraction occurs under a procedure described in the Gas Act. Before any CBM well is drilled, a well operator such as CNX must secure a permit and identify all parties who are "coal owners," "mineral owners," or "surface owners," as defined by the Gas Act. Va. Code §§ 45.1-361.1, 361.29(F); 4 Va. Admin. Code § 25-150-560.

Under the Gas Act, a coal operator must consent to a well drilled to recover the CBM from its coal seam. Va. Code § 45.1-361.29(F)(1). The coal operator's consent may be given by its lease. Va. Code § 45.1-361.29(F)(2)(a). The CBM lease that CNX entered with Swords Creek thus fulfilled a statutory prerequisite for extraction of the CBM.

The Gas Act also includes provisions by which claimants like the Surface Owners "shall be deemed, subject to a *final legal determination* of ownership, to have leased his gas or oil interest to the coalbed methane gas well operator." Va. Code § 45.1-361.22(6) (emphasis added). Being "deemed" to have leased a gas interest authorizes a successful claimant to receive their fractional interest in the royalty of one-eighth of the value of the CBM sold from the unit. Va. Code § 45.1-361.22. The Gas Act, however, does not create or impose any lease terms upon any person pooled. It merely awards the owners of the deemed interest a share of the royalties upon production. *Id.*

The Gas Act does not determine ownership of CBM, or create any preference as to whom royalties from CBM are awarded. The ownership of CBM—including royalties from production—is determined by one of three methods provided by the statute: (1) judicial decision; (2) arbitration; or (3)

commercial agreement.[3] Va. Code § 45.1-361.22(5). The Surface Owners sued Swords Creek, and Swords Creek counterclaimed, for just such a judicial determination.

Consistent with the Gas Act, the lease allows CNX to escrow the royalties generated from the sale of the CBM produced from the wells until ownership is determined. JA 121, 526. Moreover, Swords Creek waived all statutory rights created for the benefit of coal owners by the Gas Act.

The primary legal basis for the Surface Owner's claim of CBM ownership and royalties is this Court's holding in *Harrison-Wyatt*. JA 4, 194–98, 431. The Surface Owners claim that once CNX identified them as a conflicting claimant, as required by the Gas Act, *Harrison-Wyatt* cemented their status as the CBM owner. *Id.* They allege, moreover, that as the owners of the CBM, they own *all* royalties, less the escrow account fees, created from its production and sale. JA 4–5, 198, 431.

Swords Creek has alleged, and the Surface Owners do not dispute, that the CBM in question is extracted and recovered exclusively from the coal that Swords Creek owns. JA 203; *Richardson* Second Am. Countercl. ¶ 2 (Oct. 25, 2012). The Surface Owners have not alleged that they own,

[3] The Surface Owners commenced a third action, *Stilwell v. Swords Creek Land Partnership*, Civ. Act. No. 11-000316 (Russell Cnty. Cir. Ct.) which was dismissed after the parties settled ownership by entering a commercial agreement to divide the production royalties.

have purchased, or otherwise have secured any legal right to enter into the coal seams that their predecessors conveyed. The language of the 1887 severance deed describes no such rights or interests. The Surface Owners admit that they have not granted CNX the right to enter into and occupy Swords Creek's property. JA 239 ¶¶ 3–4; JA 605 ¶¶ 3–4. In the absence of such an agreement, they claim that Swords Creek's lease with CNX granted these rights for their benefit. Notwithstanding the absence of any provisions of the lease which describe such a benefit, they claim that it supports their claim to all royalties.

Finally, the Surface Owners have not alleged that the CBM and escrowed royalties they seek have been reduced to possession by any means other than the wells CNX has drilled into the coal. None of the CBM recovered from the six wells at issue has migrated from Swords Creek's coal to a previously mined void as was true in *Harrison-Wyatt*. *See* JA 147. Neither has it migrated to any other property that the Surface Owners claim to own or otherwise control to the exclusion of Swords Creek. Indeed, the Surface Owners have acknowledged that the CBM has migrated through Swords Creek's coal to be collected from the wells drilled into the seam. JA 799:6–12. There is thus no dispute that the royalties resulting from

extraction of the CBM would not exist unless Swords Creek had authorized CNX's entry into Swords Creek's coal seam.

No disbursement of the royalties to any claimant is possible until ownership is determined and the VGOB enforces the order, decision or agreement contemplated by the statute. To the extent the Gas Act expresses any preference, it is that the statute "shall be liberally construed so as to effectuate . . . development, production, utilization and conservation of the Commonwealth's gas and oil resources." Va. Code § 45.1-361.3.

STANDARD OF REVIEW

A circuit court's interpretation of the meaning of a deed generally, and a covenant of a deed specifically, are questions of law and are reviewed de novo. *Turner v. Caplan*, 268 Va. 122, 126, 596 S.E.2d 525, 527 (2004). Questions of law and statutory interpretation are reviewed de novo. *Miller v. Highland Cnty.*, 274 Va. 355, 364, 650 S.E.2d 532, 535 (2007). A circuit court's conclusions of law are reviewed de novo. *Lovelace v. Orange Cnty. Bd. of Zoning Appeals*, 276 Va. 155, 158, 661 S.E.2d 831, 833 (2008).

ARGUMENT

I. The Circuit Court Erred in Concluding that the Deed of February 7, 1887 Did Not Convey to Swords Creek All, Or Even Any, Property Rights to the CBM.

The circuit court erred first in holding that the 1887 deed is unambiguous and does not give Swords Creek any rights to the CBM in its coal seams. The deed instead must be interpreted according to settled rules of construction that favor Sword Creek's claimed rights to the CBM.

A. The 1887 Severance Deed is Distinguishable from the Severance Deed Examined in *Harrison-Wyatt.*

In considering this issue, it must first be recognized that deeds that sever coal from a fee simple estate are not uniform and can be categorized in one of three groups. The first category includes deeds referring only to coal that convey coal and necessary mining rights from a fee simple grantor to a coal grantee. These deeds have been described as "coal-only deeds" and were the subject of *Harrison-Wyatt.* 267 Va. at 549, 593 S.E.2d at 234; JA 272–82, 637–637–47. The Surface Owners allege that the deeds at issue in this case fall into this first category. JA 4 ¶¶ 17, 18; JA 431 ¶¶ 13,14.

On the other end of the continuum are deeds that broadly convey the coal and all other minerals to the grantee. Such deeds convey all mineral interests—solid, liquid, and gaseous—to create a fee estate in those minerals. *Warren v. Clinchfield Coal Co.*, 166 Va. 524, 186 S.E. 20 (1936).

Between these poles are deeds that convey the coal together with other property rights described by the deed and may include the products,

substances, or other things ***in*** or from the coal. The 1887 coal severance deed falls squarely in this final category of deeds, not in the category alleged by the Surface Owners. The deed expressly conveys the coal and the privileges of "securing the coal ***and other things in*** and on said tract of land hereinbefore specified, and removing same from off said land." JA 18, 436 (emphasis added). The deed underscores that right by providing that Swords Creek will have quiet title to those rights. *Id.*

It is error, therefore, to equate the 1887 deed to the deed in *Harrison-Wyatt* and to reflexively apply the holding in that case to the 1887 deed. Rather, the meaning of the particular language in the 1887 deed must be considered on its own terms and as applied to the particular rights at issue under Swords Creek's lease with CNX, i.e., access to the coal seams to obtain CBM within the coal seams—which are the rights at issue in this case—as opposed to the recovery of fugitive gas outside the coal seams, which was the issue in *Harrison-Wyatt*. *See* JA 147.

B. The 1887 Severance Deed Is Ambiguous.

Ambiguity is "'the condition of admitting of two or more meanings, of being understood in more than one way.'" *CNX Gas Co. LLC v. Rasnake*, 287 Va. 163, 167, 752 S.E.2d 865, 867 (2014) (quoting *Berry v. Klinger*, 225 Va. 201, 207, 300 S.E.2d 792, 796 (1983)). There is no gainsaying

that the particular language of the 1887 severance deed, as it regards the rights at issue in this case, meets that test.

The 1887 severance deed conveyed three separate and distinct property interests. First, it granted "all of the coal in, upon or underlying a certain tract of land." JA 16, 434. Second, it conveyed the "timber," although the grantor reserved the timber along three creeks on the property. *Id.* Third, the deed conveyed "privileges hereinafter specified as appurtenant to said tract of land." *Id.*

The "appurtenant privileges" as described in the deed encompass three distinct rights: (1) to use the timber "necessary to successfully and conveniently mine said ***coal and other things*** above mentioned and granted;" (2) to enter the land "for the purposes of digging, mining, or otherwise securing ***the coal and other things in*** and on said tract of land;" and (3) to use the land granted for reaching other land owned by the grantees "for the purposes of digging, mining, or otherwise securing ***the coal and other things*** hereinbefore specified and removing same from off such other land." JA 18, 436 (emphasis added).

Thus, three times the appurtenant rights in the deed refer to "other things" in which the phrase is paired with "coal." The phrase "other things" is inherently ambiguous. It certainly is broad enough to encompass the

CBM in the coal, including the right to exclude access to CBM in the coal. The CBM is something that is "in" the coal estate granted earlier in the deed. Also, a necessary incident of "digging, mining and otherwise securing" the coal is taking control of and disposing of the CBM that will inevitably be encountered "in" the coal.

The circuit court overlooked these possible meanings and held as a matter of law that the inherently non-specific phrase "other things" refers solely and exclusively to timber. That construction makes no sense and only compounds the ambiguities. If "timber" is encompassed by "things," it renders the first appurtenant right nonsensical as timber must be used to "successfully and conveniently mine" itself. It leaves unanswered why, since timber is just one "other thing," the deed uses the plural "things" instead of the singular "thing." It does not explain why the deed adopted the imprecise locution "other things" over the clearer and more parsimonious "timber." It does not acknowledge that timber can neither be dug nor mined. It does not explain why the deed uses the unusual "securing" rather than the more apt "cutting" or "logging." Finally, it ignores that "other things" did not even appear in the original 1886 deed. Thus, this deliberate addition to the severance deed is rendered a nullity.

Instead of addressing these incongruities, the circuit court ignored them. Unlike the unexamined appurtenant rights in *Harrison-Wyatt*, the appurtenant rights granted under the Swords Creek deed are extensive. The non-uniform language employed in coal severance deeds, and the variety of property interests that can be conveyed or retained in those deeds, mandates their individualized examination to reach a proper construction. The circuit court failed to do so. Instead, it simply determined that "other things" referred only to timber, thereby effectively reading the phrase out of the deed.

The construction adopted by the circuit court neither makes sense nor gives meaning to every word in the severance deed.

C. Because the Severance Deed is Ambiguous and there is No Other Evidence of the Parties' Original Intent, the Circuit Court Should Have Applied this Court's Canons of Construction in Favor of Swords Creek.

When interpreting an ambiguous deed, a court's objective is to "ascertain what was agreed and what was not agreed." *Clyborne v. McNeil*, 201 Va. 765, 770, 113 S.E.2d 672, 676 (1960). Paramount to that determination is the intent of the parties as of the date of the deed and considering the circumstances of its execution. *Ellis v. Comm'r of Dep't of Mental Hygiene & Hosps.*, 206 Va. 194, 202, 142 S.E.2d 531, 536 (1965). "[T]he only legitimate or permissible object of interpreting [a deed]s to

determine the meaning of what the parties have said therein." *Virginian Ry. Co. v. Avis,* 124 Va. 711, 711, 98 S.E. 638, 639 (1919).

In cases of an older deed, however, it is often impossible to know the parties' original intent because the relevant witnesses are long dead and contemporaneous parol documents are absent. In that instance, as the Court reaffirmed earlier this year, the deed must be interpreted according to rules of construction that favor the grantee. *Rasnake*, 287 at 168, 752 S.E.2d at 867–68. That includes the following principles:

> (1) The language must be construed against the grantor and in favor of the grantee. *Ellis*, 206 Va. at 202, 142 S.E.2d at 536.
>
> (2) The grantor must be considered to have intended to convey all that the language he has employed is capable of passing to his grantee. *Hamlin v. Pandapas,* 197 Va. 659, 664, 90 S.E.2d 829, 833 (1956).
>
> (3) The whole of a deed and all its parts should be considered together. *Auerbach v. Cnty. of Hanover*, 252 Va. 410, 414, 478 S.E.2d 100, 102 (1996). Effect should be given to every part of the instrument, if possible, *id.,* and no part thereof should be discarded as superfluous or meaningless. *Foster v. Foster,* 153 Va. 636, 645, 151 S.E. 157, 160 (1930).
>
> (4) When a deed's language is unclear as to the nature and extent of the estate the grantor intended to convey, so strong is the presumption in favor of that interpretation most favorable to the grantee, that we have

> held that where there is doubt whether one or two parcels of land were intended to be conveyed, the deed will be construed to pass title to both." *Carrington v. Goddin,* 54 Va. (13 Gratt.) 587, 610 (1857) (cited with approval in *Bostic v. Bostic,* 199 Va. 348, 355–56, 99 S.E.2d 591, 597 (1957)).
>
> (5) The language of the grant supersedes any other language in the deed repugnant to it.

See Rasnake, 287 Va. at 167–68, 752 S.E.2d at 867–68.

Here, there is no parol evidence of what the original parties to the 1887 intended with respect to CBM. The circuit court, therefore, should have applied the foregoing canons of construction and upheld Swords Creek's claim of right. The appurtenant rights expressed in the deed describe the uses which may be made of the property interests conveyed to secure "other things" together with the coal. The application of each constructive canon to the severance deed requires "other things," to include the CBM within the grant of the appurtenant interests. Because "other things" is ambiguous, it must be construed against the grantor. As "other things" can be construed to include CBM, the grantor must be deemed to have included it among the property rights conveyed. And because the language of the grant is unclear, it must be interpreted as conveying the broadest possible estate to include the CBM. This is the correct

interpretation of the deed, notwithstanding CBM's status as a "separate estate." *See Harrison-Wyatt*, 267 Va. at 554, 593 S.E.2d at 237.

D. *Harrison-Wyatt* Does Not Control This Case.

The Court's holding in *Harrison-Wyatt* is in no way inconsistent with a construction that applies the canons of construction. The holding in that case was narrow. Under the facts of that case, "title to the CBM did not pass to the Coal Owner" because the deed referred solely and exclusively to coal. *Id.* at 556, 593 S.E.2d at 238. There was no additional conveyance of the right to secure "other things" in the coal. *Id.* at 551, 593 S.E.2d at 235. Further, the Court did not describe what language in a deed was necessary to convey CBM, only that a deed conveying only coal would not. Nothing in *Harrison-Wyatt* precludes other property interests from being conveyed implicitly by the language used in the deed.

The 1887 severance deed, unlike the deed in *Harrison-Wyatt*, is not a "coal only" deed. Instead, the severance deed expressly conveys coal, timber, and appurtenant rights, and the appurtenant rights are expansive. JA 16–18, 434–36. The CBM exists only within the coal seam, and at the time of conveyance, was considered a liability rather than an asset. The deed reserves to the grantor no interest in CBM. In view of these facts, it is entirely consistent with the language of the severance deed and the

circumstances at the time of conveyance to construe the deed as conveying the CBM to the grantee.

This is especially so in view of the expansive rights conveyed to Swords Creek as part of its appurtenant privileges. A grant of the "coal" includes two aspects of real property ownership. First, it includes all rights, title, and interest to the coal. *Clayborn v. Camilla Red Ash Coal Co. Inc.*, 128 Va. 383, 383, 105 S.E. 117, 120 (1920) ("[W]hen a man buys coal . . . [t]he coal is his property. As to that he has a corporeal estate . . . ."). Second, every severance deed conveys the appurtenant rights necessary to mine and remove the coal. This is an incorporeal right granted under a deed that severs coal. *Id.* ("The right to mine and remove is an incorporeal hereditament, an easement expressed in or incident to the grant of the fee"). The Surface Owners do not dispute that both aspects of property rights were expressly conveyed by the severance deed.

The incorporeal rights include an important incident of ownership, namely, the right to dispose of impediments to mining the coal. For example, the coal grantee may use and dispose of water encountered in the process of mining. *Oakwood Smokeless Coal Corp. v. Meadows*, 184 Va. 168, 177, 34 S.E.2d 392, 396 (1945) ("When the coal company's predecessors were given the right to mine coal, they were given those

usual mining privileges necessary for the full enjoyment of this mining right. . . . It had the right to bring [water] by gravity to the mouth of the mine and there let it flow where gravity took it."). "The right to mine coal without the right to drain the mine is no right at all." *Id.* at 178, 34 S.E.2d at 396.

This principle is equally applicable to CBM. This dangerous and explosive gas was known and feared when the deed was executed as recognized by the Court in *Harrison-Wyatt.* 267 Va. at 551, 593 S.E.2d at 236. As a matter of safety, coal operators are required to ventilate CBM during mining to create a safe environment for miners, and historically this was accomplished by venting the CBM into the atmosphere. The General Assembly codified this as a legal duty by statute in 1912. *See* 128 Va. Acts 419–34 (1912). This duty has not changed in a century, and was not modified by the Gas Act. The severance deed conveyed to the grantee this right to deal with the CBM as a necessary incident of the incorporeal right to mine the coal.

Title to the CBM thus could pass to the grantee under the severance deed in either of two ways. It could pass to the coal grantee as part of its corporeal estate in the coal or as part of its incorporeal right to control and use the coal. The construction of the severance deed adopted by the circuit court by which the Surface Owners retained the CBM is contrary to

historical experience. To hold otherwise diminishes the extent of the grant which the language employed by the deed is capable of conveying. *Goodson v. Capehart*, 232 Va. 232, 237, 349 S.E.2d 130, 134 (1986); *Waskey v. Lewis,* 224 Va. 206, 211, 294 S.E.2d 879, 881 (1982).

The Court in *Harrison-Wyatt* held that CBM was a separate mineral estate. It did not state that the use of particular terms such as "CBM" or "methane" was necessary to convey it in a deed. Neither did the Court describe rules of conveying CBM that are unique to it, and exclusive of all other rules by which property is conveyed or retained in Virginia. Recently, the Court has reaffirmed the principles by which deeds must be interpreted and property rights decided. *Rasnake*, 287 Va. at 167–68, 752 S.E.2d at 867–68. The instant case demonstrates why courts must employ those principles in careful analysis to determine what deeds mean. Reliance upon formulations or rubrics such as "coal only" deeds is insufficient to meet that burden.

II. The Circuit Court Erred in Concluding that Swords Creek's Ownership of the Coal and Appurtenant Rights Does Not Include the Right to Control Extraction and Recovery of CBM Which Remains within the Coal for the Payment of a Royalty.

The circuit court additionally erred in holding that the 1887 deed did not give Swords Creek the right to charge a royalty to access its coal

seams for the purpose of extracting CBM. Regardless of whether the deed conveyed to Swords Creek ownership of CBM in the coal, it indisputably gave Swords Creek the exclusive right to access the coal seams. Swords Creek thus was entitled to charge CNX for the right to access those seams.

A. The Circuit Court's Ruling

Swords Creek maintains exclusive control of the extraction and recovery of CBM in question. Swords Creek maintains these rights not only because of its expansive grant of appurtenant privileges, but as part of the general warranty of title and covenant of quiet possession contained in the severance deed. JA 16–18, 434–36. Pursuant to the terms of the severance deed, the Surface Owners are prohibited from asserting a claim to any beneficial use of the coal seam. Any intrusion or encumbrance is a breach of the warranty and covenants. In its counterclaim, Swords Creek sought to vindicate its rights both to its unchallenged ownership of the physical coal seam and its sole right to use and develop the seam. JA 203–12, *Richardson* Second Am. Countercl. 1–10 (Oct. 25, 2012).

The circuit court incorrectly ruled that any issue of access to the coal seam for the purpose of recovering CBM was "irrelevant." Notwithstanding the revised allegations of its counterclaim, the circuit court concluded that Swords Creek alleged "no facts and states no cause of action against the

Plaintiffs upon which relief can be granted." JA 223–27, 389–90, 731–32, 749–53. The circuit court ultimately dismissed Swords Creek's entire second amended counterclaim. JA 406–08, 746–48.

That was erroneous. It failed to recognize that Swords Creek had the right of uninterrupted and exclusive access to the coal seams that is separate from any ownership of the CBM. The circuit court's holding erroneously eliminates that separate property and disallows Swords Creek's right to demand payment for access.

B. This Case Raises the Unresolved Issue Reserved by This Court in *Harrison-Wyatt*.

The Surface Owners allege that this Court's decision in *Harrison-Wyatt* addressed and resolved all issues associated with its claims of ownership of the CBM and the production royalties paid under Swords Creek's lease of its coal seams to CNX. JA 4, 194–98, 431. The circuit court accepted this allegation uncritically and found that counts two and three of Swords Creek's counterclaims were insufficient to limit the Surface Owners' rights in the royalties, notwithstanding the circumstances under which the CBM was produced and the royalties paid. JA 224–25, 750–51.

The circuit court misinterpreted this Court's analysis in *Harrison-Wyatt.* In that case, this Court recognized the "three methods for fracturing coal in order to capture CBM as an economic resource. One method is by

drilling wells from the surface into the coal seam . . . . The third way is by employing what are called "gob" wells relating to long-wall mining." *Harrison-Wyatt*, 267 Va. at 551, 593 S.E.2d at 235. The facts of *Harrison-Wyatt* pertained to the third method in which CBM had migrated from solid coal to a mined void, an area sometimes referred to as "gob."[4] Based on this fact, this Court reached a narrow holding that the coal-only deed did not convey the CBM that migrated to the void. The Court avoided any inquiry into the right of the coal owner to control CBM production from its coal seam and its right to be compensated for that production. *See id.* at 549–57, 593 S.E.2d at 234–38. Significantly, however, at the conclusion of its opinion, this Court noted:

> The trial court also made the following finding: "The surface owners' rights to the CBM only extend to that which has ***separated from the coal***. The surface owner does not have the right to frac[ture] the coal in order to retrieve the CBM." This finding was not in response to an issue brought by either party at trial or on appeal, and, therefore, we express no opinion regarding this finding.

Id. at 557 n.3, 593 S.E.2d at 238 n.3 (emphasis added).

The facts of the present case involve the first method of producing

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[4] The issue of migration of the CBM from unmined coal was noted by the Court in its discussion of two other cases, *United States Steel Corp. v. Hoge,* 503 Pa. 140, 468 A.2d 1380 (1983) and *NCNB Tex. Nat'l Bank, N.A. v. West,* 631 So.2d 212 (Ala. 1993).

CBM noted in *Harrison-Wyatt*, i.e., "drilling wells from the surface into the coal seam." *Id.* at 551, 593 S.E.2d at 235. Therefore, this case squarely places before the Court the issue of a coal owner's right to control CBM production when the gas has not migrated, but remains in a coal seam owned and controlled by a coal owner and can be recovered exclusively from that coal seam. For all of the reasons that follow, the only reasoned conclusion is that Swords Creek does retain the right to control CBM production and to profit from it according to the terms of its lease. The circuit court erred in concluding otherwise.

C. Swords Creek Maintains the Exclusive Right to Authorize CBM Production.

The ownership of a mineral estate, as any form of real property, comprises multiple rights. Among these are two distinct rights or incidents of ownership: (1) title to the mineral in place or upon capture, and (2) the right to develop the property and produce the mineral, including the lease of that right to another. Collectively, these rights comprise a person's entire economic interest in property which are necessary for its ownership.

The Surface Owners have alleged neither of these necessary incidents, nor can they do so under the severance deed. Nor have they alleged that their rights, whatever they may be, give them any rights in or access to the coal seam.

An estate in coal differs completely from one in oil and gas. Coal is regarded as corporeal property that differs little from any other corporeal interests in real estate. *Clayborn*, 128 Va. at 383, 105 S.E. at 120 ("[W]hen a man buys coal . . . he simply gets the coal, with the right to remove it. The coal is his property. As to that he has a corporeal estate."). As with any corporeal property, it includes the right to exclude others from the estate. Exercising the necessary right to mine and remove the coal is an incorporeal right granted under a deed that severs coal. *Id.*

Conversely, the entire estate in oil and gas is regarded as incorporeal. Title to the oil and gas does not arise until a well is drilled and the gas is reduced to possession. *Kan. Natural Gas Co. v. Bd. of Comm'rs of Neosho Cnty.*, 75 Kan. 335, 335, 89 P. 750, 752 (1907) ("[U]ntil gas is actually produced and severed, so that it becomes personalty, the legal title to and the possession of the entire volume remain in the owner of the strata in which it is confined."); *see also Westmoreland & Cambria Natural Gas Co. v. DeWitt*, 130 Pa. 235, 249–50, 18 A. 724, 725 (1889) ("Water and oil, and still more strongly gas . . . belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone.") (quoted with approval in *Brown v.*

Spilman, 155 U.S. 665, 670 (1895) and *Powers v. Union Drilling Co.*, 194 W. Va. 782, 787, 461 S.E.2d 844, 849 (W. Va. 1995)).

The incorporeal right to develop natural gas is customarily granted to another by means of a lease. This "executive right" is well recognized in other states in which oil and gas have long been developed. *Altman v. Blake*, 712 S.W.2d 117, 119 (Tex. 1986) (equating the term "executive right" with the right to execute oil and gas leases); *Day & Co., Inc. v. Texland Petroleum, Inc.*, 786 S.W.2d 667, 669 (Tex. 1990); *Donahue v. Bills*, 172 W. Va. 354, 355, 305 S.E.2d 311, 312 (1983).

The "rule of capture" bears this out. Unlike coal, which has a fixed location, gas is traditionally seen as migratory. Gas can only be "owned" while it is in, or under the control of, the landowner. A lateral property owner can capture it from his own property and divest his neighbor's ownership. The same characteristics of gas that resulted in the "rule of capture" have also caused difficulty in describing the nature of gas "ownership." However, as Professor Kuntz notes in his leading treatise on oil and gas:

> The adoption of a theory of ownership ultimately represents little more than the selection of an acceptable method of describing ownership in the light of the law of capture . . . . The difference between such theories is a matter of placing the emphasis in describing the rights of the owner and

> is about the same as the difference between describing a checkered pattern as consisting of black checks on a white background or as consisting of white checks on a black background.

1 Eugene Kuntz, *Law of Oil and Gas* § 2.4 (1989).

Courts in different states have reached varying conclusions about gas ownership and rights. In some states, the gas owner does not have absolute title to the oil and gas in place as corporeal real property, but instead simply the exclusive right to drill for the oil and gas. *See e.g.*, *Gerhard v. Stephens*, 68 Cal. 864, 878, 442 P.2d 692, 705–06 (1968). Other states consider the gas to be owned in place together with the exclusive right to drill, even though it is subject to lawful loss of ownership if the gas or oil migrates or is captured by a neighbor. *Ellif v. Texon Drilling Co.*, 146 Tex. *575,* 580, 210 S.W.2d 558, 561 (1948).

Under either theory, the primary incident of gas ownership is the right to explore for and produce the gas from the formation where it can be found.[5] This is the right granted in any gas lease, regardless of whether the lease purports to convey the gas and the right to produce it or just the right to produce the gas. Both accomplish the same thing; and, without the

[5] In describing a full mineral interest, Professor Kuntz states that "the owner of the full mineral interest has the right to enter upon the land and to extract oil and gas and he has the power to confer such right upon another by executing an oil and gas lease." 1 Eugene Kuntz, *Law of Oil and Gas* § 15.2 (1989) (internal citations omitted).

lessor's underlying property right to produce the gas, neither would accomplish anything.

The right to develop the CBM is inherent in any meaningful idea of ownership. In its absence, the full economic interest in the property cannot be realized. The right of development comprises the property rights needed to drill and locate wells into the geologic strata—the coal—from which the gas can be profitably extracted. Swords Creek was conveyed this right under the 1887 severance deed. It maintains the exclusive right to extract and recover the CBM within its coal seams, or authorize another to do so. In comparison, the Surface Owners—whatever their rights, if any, to the CBM—surrendered their incorporeal right of development when they conveyed the coal.

Indeed, CNX could never have recovered the CBM unless Swords Creek permitted it to do so. The right to locate wells in the coal and then fracture it are rights that belong to Swords Creek. The burden placed on Swords Creek by the presence of wells and the fracturing of its coal seam is also significant. CNX secured these rights to capture CBM in commercial quantities with the objective of achieving a profitable operation. The fact that it entered such a lease demonstrates that more than the bare title to the gas in place is necessary to develop, and thus own, the CBM.

In contrast, CNX did not enter a CBM lease with the Surface Owners. Unlike Swords Creek, the Surface Owners can claim no right to enter the physical strata that their predecessors-in-interest conveyed in 1887, and from which all CBM is produced. They can identify no legal source of that right. Neither can they explain how CNX can produce CBM for their exclusive benefit. Nothing in Swords Creek's lease with CNX indicates that it is intended to benefit anyone except Swords Creek. Accordingly, whatever property rights the Surface Owners might have in the CBM, no development can occur without Swords Creek's consent and compensation. Swords Creek's compensation by means of the royalties is the simple consequence of its physical ownership of the coal and the exclusive right to develop it.

The circuit court's conclusion that a property right to develop CBM is "irrelevant" to CBM ownership and the rights to the resulting royalties erroneously avoided any analysis of the property rights in the coal seam. Its conclusion was incorrect as to the property rights that Swords Creek maintains in its coal.

D. The Surface Owners' Claims Violate the Deed's Covenants of General Warranty and Quiet Possession.

Under the language of the initial December 1886 deed, the grantors

conveyed the coal to the grantees with "the covenant that they will warrant generally the property hereby conveyed . . . that the [Grantees] shall have quiet possession of the said property." JA 222, 438. The same language appeared in the subsequent severance deed, except that to the covenant of quiet possession was added the words, "free from incumbrances." JA 18, 436. By virtue of filing their action seeking a declaration of both their ownership of the gas and their exclusive right to all royalties from its production, the Surface Owners have breached these covenants.

Under Virginia law, both the general warranty of title and a covenant of quiet possession represent two obligations of the grantor and the grantor's successors-in-interest, i.e., the Surface Owners. The first, the general warranty, requires that the Surface Owners defend the title of the property conveyed against all persons who would claim any interest in the property. Title 55 of the Code of Virginia provides that the general warranty "shall have the same effect as if the grantor had covenanted that he, his heirs and personal representatives will forever warrant and defend such property unto the grantee, his heirs, personal representatives and assigns, against the claims and demands of all persons whomsoever." Va. Code § 55-68; *see also Fisher v. Va. Elec. & Power Co.*, 258 F. Supp. 2d 445, 449

(E.D. Va. 2003) ("[I]t is clear that the Virginia Code treats a covenant of warranty as a general indemnification clause . . . .").

The covenant of quiet possession negates the grantor's right to enter the property. *Sheffey's Ex'r v. Gardiner*, 79 Va. 313, 318 (1884) ("[W]here, at the time of the conveyance, the grantee finds the premises in possession of one claiming under a paramount title, the covenant for quiet enjoyment, or of warranty, will be held to be broken, without any other act on the part of the grantee. . . ."). As one contemporary treatise explained, the covenant of quiet possession entitled the grantee not merely to "quietly enter upon, and have, hold, and quietly enjoy the land conveyed by the deed," but also to "receive and take the rents and profits thereof, to and for his and their use and benefit, without any eviction, interruption, suit, claim, or demand whatsoever." 2 Minor, *Institutes of Common and Statute Law* 722 (4th ed. 1892) (hereinafter "Minor"). The statutory provisions of the Virginia Code adhere to this understanding.[6]

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[6] "[T]he grantee, his heirs and assigns might, at any and all times thereafter, peaceably and quietly enter upon and have, hold and enjoy the land conveyed by the deed, or intended so to be, with all the buildings thereon and the privileges and appurtenances thereto belonging, and receive and take the rents and profits thereof, to and for his and their use and benefit, without any eviction, interruption, suit, claim or demand whatever." Va. Code § 55-72.

The addition of the phrase "free from incumbrances" adds to the covenant of quiet possession the further indemnification of the grantor for any demands made against the property. Minor at 721. This covenant is likewise embraced by current Virginia statute.[7] *Accord Adams v. Seymour*, 191 Va. 372, 378, 61 S.E.2d 23, 26 (1950).

Under the covenants contained in the severance deed, the Surface Owners have the affirmative obligation to refrain from entering the coal seam, authorizing another to do so, or asserting rights in it for their exclusive benefit. Minor at 721. Nowhere in the severance deed did the Surface Owner's predecessor-in-interest retain any property rights in the coal they conveyed by means of a reservation or exception or by an easement in the coal. A reservation was expressed in the deed, but solely as to selected timber and the limited use of coal during the lives of the grantors. The claim brought by the Surface Owners as to the ownership of all of the CBM and all royalties from its production—royalties paid for the right to enter the coal seam which could only be conferred by Swords

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[7] "If to such covenant there be added "free from all encumbrances," these words shall have as much effect as the words "and that freely and absolutely acquitted, exonerated and forever discharged, or otherwise by the said grantor or his heirs saved harmless and indemnified of, from and against any and every charge and encumbrance whatever." Va. Code § 55-72.

Creek—breaches both the general warranty as well as the covenant of quiet possession.

Therefore, the Surface Owners may not benefit from the drilling of a well into Swords Creek's coal and then assert their exclusive ownership of the CBM without violating the warranty and covenants contained in the deed. Enforcement of the covenants of title lies against both the real property interests in question, in the form of the coal and the right to control CBM production from the coal seam, and the personal property in the form of royalties from its production. Minor at 714.

E. The Gas Act Recognizes the Two Incidents of Ownership.

The Gas Act, like Virginia common law, recognizes that ownership of CBM comprises the economic interest in two distinct property interests: title and the right of development. Va. Code § 45.1-361.1 *et seq.* Under the Gas Act, a person may possess title as a "royalty owner" meaning either "any owner of oil and gas in place, or owner of gas or oil rights eligible to receive payment based on the production of gas." Va. Code § 45.1-361.1. The second interest in the right of production is defined by a "gas owner," as one having "the right to explore for, drill, or operate a gas or oil well." *Id.* The statute does not require that these rights be owned by a single person.

These statutory definitions recognize that a coal owner may have a property right in CBM even if that coal owner does not retain the incident of title to the gas in place. The coal owner's gas rights under the statute are verified upon a demonstration of a right to a royalty that arises from production of the resource. Neither *Harrison-Wyatt* nor the subsequent amendment of the Gas Act has altered the distinction between title and the right of development. 267 Va. at 594, 593 S.E.2d at 234; Va. Code § 45.1-361.21.1. Both incidents of property collectively are necessary to comprise the complete ownership of CBM and its royalties.

Furthermore, the Gas Act cannot serve as the source of authority for any right of development or executive right to lease that interest. Only upon a determination of the Surface Owners' ownership of the CBM in question does the statute deem their interest in the CBM to be leased to CNX. Prior to that determination, the Gas Act provides no legal authority at all for any claim to the CBM or the royalties. Va. Code § 45.1-361.22.6.

Accordingly, the Surface Owners cannot claim the Gas Act as the source of law that granted them the extraordinary right to develop the CBM, without regard to Swords Creek's ownership of the coal seam. In order to claim and recover all the royalties now escrowed with the VGOB, the Surface Owners must identify their complete economic interest in the CBM.

At most, they can claim the title to it on the grounds that it was not conveyed under the severance deed. Nevertheless, even a complete economic interest in mineral property may be insufficient to authorize its development if the consequence of recovering the mineral imposes a burden on the servient property. *Phipps v.Leftwich*, 216 Va. 706, 222 S.E.2d 536 (1976). Nothing in their deed, the common law or the Gas Act grants them any right of development. Indeed, the warranty and covenant affirmatively disclaim any right to, or use of the coal seam from which all of the CBM has been produced. To the extent the Surface Owners possess any ownership of the CBM, it is a joint one with Swords Creek, and it does not supplant or eliminate the property rights of Swords Creek. In the absence of Swords Creek's concurrence, no CBM can be recovered. The circuit court erred by ruling that Swords Creek could not charge for permitting CNX to enter its coal seam.

III. The Circuit Court Erred in Holding that the Surface Owners' Are Not Unjustly Enriched If They Receive All the Royalties Resulting from CBM Production from Swords Creek's Unmined Coal in which They Possess No Property Rights.

The circuit court held that count six of Swords Creek's second amended counterclaim stated no facts upon which a claim for unjust enrichment could be established. The Surface Owner's demurrer was

sustained on the grounds that Swords Creek failed to show "sufficient facts to state [that] there is an implication that the Appellees should have expected to pay the Defendant for any benefit." JA 688, 753. That holding was error because it applied the wrong legal standard. It applied the standard for quantum meruit (which concerns implied contracts) instead of the broader equitable doctrine of unjust enrichment.

Unjust enrichment occurs when title "'has been fairly and properly acquired, but it is contrary to the principles of equity that it should be retained, at least for the acquirer's own benefit.'" *Leonard v. Counts*, 221 Va. 582, 589, 272 S.E.2d 190, 195 (1980) (quoting 1 John Minor, *Real Property* § 462 (2d ed. 1928)). To remedy this inequity, courts employ a constructive trust to prevent the unjust enrichment of one party. *Id.* at 589–90, 272 S.E.2d at 195–96; *Faulkner v. Shafer*, 264 Va. 210, 216, 563 S.E.2d 755, 759–60 (2002) (finding that constructive trusts occur even when "property has been acquired fairly and without improper means"); *Cooper v. Cooper*, 249 Va. 511, 517, 457 S.E.2d 88, 92 (1995).

In contrast, to establish an implied contract, a party must adduce facts that there was a "promise to pay" for the disputed benefit. *Mullins v. Mingo Lime & Lumber Co.*, 176 Va. 44, 51, 10 S.E.2d 492, 495 (1940). Courts utilize quantum meruit to remedy non-performance or breach of an

implied contract. *Hendrickson v. Meredith*, 161 Va. 193, 198, 170 S.E. 602, 604 (1933).

The distinction between unjust enrichment and implied contract is critical. Courts may impose a constructive trust to prevent unjust enrichment even when there is no promise to pay and property has been fairly acquired. Unlike an implied contract, a party does not have to show that it promised to compensate the adverse party for the disputed benefit. *Richardson v. Richardson*, 242 Va. 242, 245–46, 409 S.E.2d 148, 150–51 (1991).

Swords Creek alleged a claim for unjust enrichment—not implied contract—and requested that the court employ a constructive trust to remedy the inequity that would exist if Swords Creek went uncompensated for the use of its coal seam to the Surface Owners' exclusive benefit. JA 216–18, *Richardson* Second Am. Countercl. 14–16 (Oct. 25, 2012). Nevertheless, the circuit court sustained the demurrer to count six on the grounds that Swords Creek failed to assert "sufficient facts to state [that] there is an implication that the Plaintiffs should have expected to pay the Defendant for any benefit." JA 688, 753. This is an incorrect statement of the law. A constructive trust may arise "independently of the intention of the parties." *Leonard*, 221 Va. at 588–89, 272 S.E.2d at 195. Therefore,

the circuit court's conclusion that Swords Creek failed to show a "promise to pay" was irrelevant to the applicable legal standard.

Moreover, Swords Creek alleged sufficient facts to withstand the Surface Owner's demurrer. Ownership is the lynchpin of unjust enrichment. Here, the Surface Owners' predecessor severed the coal from the fee simple estate. CBM has been extracted—and could only be extracted—from Swords Creek's coal under a lease that Swords Creek entered for the economic consideration of a royalty on production of the CBM. JA 107–26, 512–31. The Surface Owners have not entered a lease with CNX. Yet, the Surface Owners claim that they are entitled to *all* funds escrowed and *all* royalties in the future, but present no analysis why this result occurs. If the Surface Owners are deemed the owner of all property rights to the CBM, the economic benefit will flow *entirely* to them. This would give the Surface Owners precisely that access to Swords Creek's coal seam which their predecessor surrendered. This outcome would ensure that coal owners would never lease their coal for CBM development, thus defeating the principle purpose of the Gas Act. Va. Code § 45.1-361.3(1).

Equity will be violated if the Surface Owners are enriched at Swords Creek's expense by the award of all royalties from CBM production.

Production of CBM occurs by entering Swords Creek's property—the coal seam—and then fracturing it to promote the flow of gas. To allow the Surface Owners to profit from production that occurs exclusively from Swords Creek's property would constitute unjust enrichment.

To promote equity, the Court should apply a constructive trust to the production royalties escrowed with CNX. The Court should award the proceeds attributable to production equitably between Swords Creek and the Surface Owners. If the Court determines that the Surface Owners maintained title to the CBM in question, the application of a constructive trust to divide the royalties would avoid the inequity and unjust enrichment that follows from the exclusive award in favor of the Surface Owners.

CONCLUSION

The Court should reverse the judgment below and enter judgment for Swords Creek. Swords Creek owns the coal that contains the CBM and the exclusive right to access the coal seams. The royalties are the compensation CNX agreed to pay for permission to access those seams.

Not only does the severance deed convey the CBM to Swords Creek, it conveys the essential property rights necessary to control its development. For all of these rights it deserves compensation. The

judgment of the circuit court should be reversed and the case remanded with instructions to award the royalties to and final judgment Swords Creek.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rule 5:26(e) of the Supreme Court of Virginia, on this 9th day of April 2014, I have caused fifteen (15) copies of this Opening Brief of Appellant, and one electronic copy (via CD) to be filed with the Clerk of the Supreme Court of Virginia, and that I have caused to be mailed, first class postage prepaid, three (3) copies of this Opening Brief of Appellant and one electronic copy (via CD) to Terrence Shea Cook, Post Office Box 507, Richlands, Virginia 24641.

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