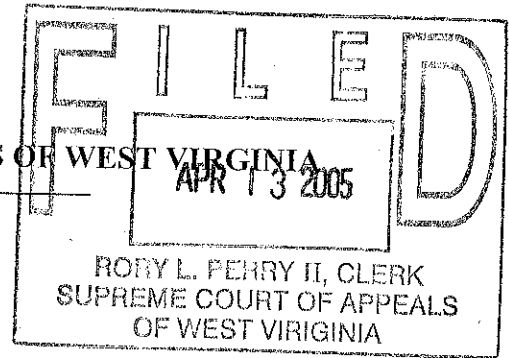


Case No. : 32530

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



**WILLIAM M. KESTER and  
ORIAN LEE NUTTER, II,**  
Appellees,

v.

**CIVIL ACTION NO.: 03-C-246-2  
Circuit Court of Harrison County**

**J. THOM SMALL, DIVERSIFIED  
RESOURCES, INC., a West Virginia  
Corporation; J. CARL PALMER,  
ELIZABETH A. DODD, and  
ADAM F. WILSON, Beneficiary of the  
Estate of NELMA M. WILSON, Deceased,  
Defendants Below**

**J. THOM SMALL, Appellant.**

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**BRIEF ON BEHALF OF APPELLEES**

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SUBMITTED BY:

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## INACCURACIES IN APPELLANT'S STATEMENT OF THE CASE

Although the Appellant contends that the Circuit Court of Harrison County, West Virginia, reversed its December 20, 1935 Order, the Circuit Court merely made that Order speak the truth of its pronouncement that the coal, oil and gas interests inherited by William G. Kester's four heirs were "not susceptible to partition in kind and should continue to remain held in common by the [four Kester heirs]." Accordingly, the Circuit Court did not err in granting summary judgment in favor of the Appellees to correct its judgment to include the provision that the oil and gas interests underlying the 16.89 acres at issue were to be held in common by the four Kester heirs where (i) such were the only mineral interests owned by William G. Kester, other than those underlying city or cemetery lots, which were not specifically reserved unto the four Kester heirs by said Order; (ii) the law in West Virginia at the time of the December 1935 Order was that oil and gas interests could not be partitioned in kind, but only by way of sale; and (iii) for almost seventy (70) years, all parties, including the Appellant, acted consistently with the Circuit Court's intent that all of William G. Kester's mineral interests be held in common by his four (4) heirs.

## STATEMENT OF FACTS

The following facts before the Circuit Court are undisputed:

1. William G. ("W.G.") Kester, a resident of Harrison County, West Virginia, died intestate leaving as his heirs his four (4) children, Cecil B. Kester, John M. Kester, Earl Kester and Elizabeth A. Johnson.
2. W.G. Kester died seized of several tracts or parcels of land and mineral interests under certain tracts or parcels of land located in Harrison County, West Virginia.

3. Union National Bank of Clarksburg, West Virginia, as Administrator of the estate of W.G. Kester, conveyed by special warranty deed all of the tracts or parcels of land and all mineral, coal and oil and gas interests in Harrison County of which W.G. Kester died seized to his four (4) children, by Deed dated May 1, 1935 ("Union National Deed"). See Exhibit A<sup>1</sup>. Parcel No. 2 of said Deed pertains to the surface and oil and gas interests of 17 acres, more or less, on Davisson's Run, Simpson District, Harrison County, West Virginia, being the oil and gas interests under the 16.89 acres at issue. See Exhibit A at page 381.

4. All of W.G. Kester's real property interests were subject to a deed of trust lien held thereon by Union National Bank. See Exhibit C.

5. In 1935, Cecil B. Kester filed a bill to partition the lands inherited by him and his siblings from their father, W.G. Kester. By Order entered September 26, 1935, the Circuit Court of Harrison County, West Virginia found that each of W.G. Kester's children owned an undivided one-fourth (1/4) part or interest in the tracts or parcels of land and mineral interests of which their father died seized.<sup>2</sup> See Exhibit B.

6. In paragraph 3 of its September 1935 Order, the Circuit Court listed the mineral interests owned by W.G. Kester, noting whether such were under lease and if known, whether producing; however, the Circuit Court did not include in its list the following tracts or parcels of land:

(a) City lots, being several Parcels. See Schedule 1 attached hereto;

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<sup>1</sup>Unless noted otherwise herein, references to Exhibits identified by letters are to those Exhibits attached to the Complaint as originally filed.

<sup>2</sup>The lot, parcel or tract numbers used in the September 25, 1935 Order and the December 20, 1935 Order, discussed hereinbelow, correspond to the lot, parcel or tract number designations used in the Union National Deed. See Exhibits A, B and C.

(b) Cemetery lots, being Parcel 17 and Parcel 14;

(c) Parcel 11, being 29.70 acres, Clark District, Harrison County, subject to an oil and gas lease;

(d) Parcel 27, being 93.35 acres, Nutter's Run, Clark District, Harrison County, subject to an oil and gas lease; and

(e) Parcel 2, being 16.89 acres, Simpson District, Harrison County, subject to an oil and gas lease and further being the oil and gas interests at issue.

7. In paragraph 3 of its September 1935 Order, the Circuit Court found that the mineral interests and the oil and gas interests were "*not* susceptible of partition in kind and should continue to remain held in common by [the four Kester heirs]." See Exhibit B at page 348 (emphasis added).

8. In paragraph 4 of its September 1935 Order, the Circuit Court held that each of W.G. Kester's children was entitled to a one-fourth (1/4) undivided interest in the "lots, tracts and parcels of land and *mineral* interests", and further held that each was entitled to a like interest and that each was entitled to partition in kind of "all said lots, tracts and parcels of land", but excepted from partition the mineral interests listed in paragraph 3, being (i) mineral interests only in Parcel 3; (ii) oil and gas interests underlying Parcels 1<sup>3</sup>, 6, 8, 22 and 23; and (iii) coal underlying Parcel 23. Exhibit B at pages 348 and 349. (underscores added) (The parties do not dispute that this paragraph erroneously refers to coal under Parcel No. 23, rather than as correctly stated under Parcel No. 26 as in preceding paragraph of said Order.). Again, the Circuit Court did not include in its list of mineral interests to be held in common by the Kester heirs those

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<sup>3</sup>Included in Parcel 1 were three small lots but the oil and gas under the entire Parcel were to be held in common and not partitioned.

mineral interests underlying city or cemetery lots and those mineral interests under lease in Parcel 2, being the oil and gas interests at issue, and Parcels 11 and 27.

9. The Circuit Court's September 1935 Order did not include the mineral interests of Parcels 11 and 27 among those specifically listed to be held in common; however, its December 1935 Order stated, "the assignment of said ... [Parcel 27] and [Parcel 11] does not include the oil and gas thereunder *heretofore decreed to be held in common*". See Exhibit C at pages 5-6 (emphasis added). Accordingly, in its December 1935 Order, the Circuit Court corrected the omission in its prior Order and specifically excluded from partition such oil and gas interests under Parcels 11 and 27 but again failed to do so for such interests under Parcel 2. See Exhibit C at pages 5-6. Thus, of the numerous mineral interests owned by W.G. Kester at his death, the only ones not specifically listed to be held in common by the four Kester children were those under city or cemetery lots and those under Parcel 2, being the 16.89 acres at issue. See Exhibit D.

10. Schedule 1 attached hereto and made a part hereof summarizes the status of the partition as a result of the Circuit Court's September and December 1935 Orders.

11. After the partition suit, Union National Bank as Executor of the W.G. Kester Estate continued to collect the mineral royalties from all mineral tracts owned by W.G. Kester and credited such against the debt owed to it by W.G. Kester so that the royalties belonging to all four (4) Kester heirs were used to satisfy the debt against each of the Kester heirs' respective tracts of surface awarded to him or her under the partition.

12. At all times, each of the Kester heirs acted consistently with the Court's September 1935 Order that the oil and gas interests were owned by them as tenants in common, including the oil and gas interests under Parcel 2's 16.89 acres awarded to John M. Kester. The following

are some examples of how the Kester children and/or their successors in interest acted consistently with the Circuit Court's position that the oil and gas interests were not susceptible to partition and were to be held in common by the four (4) Kester children:

(a) On March 1, 1939, Hope Natural Gas Company ("Hope") executed a lease with the Kester children and their respective spouses for each of the Kester children's 1/4 interest in the oil and gas interests under Parcel 2's 16.89 acres. See Exhibit D. No evidence exists that Hope drilled a well under said lease.

(b) Cecil B. Kester conveyed his 1/4 interest in the oil and gas under said 16.89 acres in equal shares to his two (2) children, William M. Kester and Kathleen Nutter, retaining a life estate therein, and Cecil B. Kester's Appraisal of his estate reflected said conveyances and retainment of a life estate. See Exhibits E (Parcel 7(d) therein); Exhibit F (Parcel 3(d) therein); and Exhibit G, respectively.

(c) John M. Kester died a resident of Harrison County, West Virginia, in 1969. The Appraisal for his estate listed his owning "1/4 Int. 17 As. O & G Davisson Run" in Simpson District, being the oil and gas interests under the 16.89 acres. See Exhibit H. John M. Kester's 1/4 interest in the oil and gas interests awarded to him under the aforementioned Orders, including, but not limited to, his 1/4 interest in the oil and gas under said 16.89 acres, passed to his son, John E. Kester, and then to John E. Kester's wife, Isabelle A. Kester, by John E. Kester's last will and testament of record in the Office of the Clerk of the Harrison County Commission at Will Book 75 at page 630.

(d) Isabelle A. Kester sold to Appellant all her 1/4 interests in oil and gas which were those awarded to John M. Kester by the aforementioned Orders and which she had acquired from her husband's estate, as set forth in that Corrective Deed dated March 12, 1982. See Exhibit I.

(e) Elizabeth A. Johnson inherited Earl Kester's 1/4 interest, making her the owner of an undivided 1/2 interest in all oil and gas underlying said 16.89 acres. Upon Elizabeth A. Johnson's death, her undivided 1/2 interest in said oil and gas passed to her three children: namely, Wilbur Johnson whose interest passed upon his death to his wife, the Appellee Elizabeth A. Johnson, now Elizabeth A. Dodd; Nelma Johnson Wilson whose interest passed upon her death to her husband, the Appellee Adam F. Wilson; and Mary Louise Palmer whose interest passed upon her death to her husband, the Appellee J. Carl Palmer.

(f) On January 21, 1985, Petroleum Development Corporation ("PDC") executed a lease with Appellant, William M. Kester ("W.M. Kester") and spouse and Maude M. Kester (Cecil B. Kester's widow) for their respective interests in the oil and gas under the 16.89 acres at issue in this case. See Exhibit J. There is no evidence that the other interested parties entered into a lease with PDC or that PDC drilled a well under its lease.

(g) Because all of the interests of W.G. Kester were subject to a deed of trust lien in favor of Union National Bank, the oil and gas interests were collectively assessed to the W.G. Kester heirs and were not separately assessed until the debt was paid off in or around 1961. At such time, Union National Bank complied with Cecil B. Kester's request that the interests owned jointly by Elizabeth A. Johnson, Cecil B. Kester and John E. Kester be separately assessed. See Union National Bank letter dated November 28, 1961, being Exhibit 1 attached to the Plaintiffs and Defendants J. Carl Palmer, Elizabeth A. Dodd and Adam F. Wilson's Motion for Summary Judgment. Thereafter, each of the oil and gas interests held by the Kester children and/or their successors in interest, including the oil and gas interests at issue, was separately assessed by the Assessor of Harrison County. See Exhibit 2 to said Motion for Summary Judgment.

13. Interested in drilling a well on the 16.89 acre tract at issue in this case, Diversified Resources Inc. ("Diversified") hired attorney James V. Cann to do a title abstract of said tract.

14. Attorney James V. Cann opined that John M. Kester owned 100% of the oil and gas interests under Parcel 2's 16.89 acres rather than an undivided 1/4 interest therein because the December 1935 Order failed to specifically exclude from partition the oil and gas interests under Parcel 2's 16.89 acres awarded to John M. Kester as all other oil and gas interests were excluded. See Exhibit K.

15. Accordingly, Appellant is now claiming all of the oil and gas interests under Parcel 2's 16.89 acres instead of the undivided 1/4 interest he purchased. Appellant and Diversified Resources Inc. executed a lease for all of the oil and gas interests under said 16.89 acres, which were subject to the 1935 partition suit discussed herein. See Exhibit L. Diversified paid Appellant all of the signing bonus and/or delay rentals.

#### **STATEMENT REGARDING ALLEGED ERRORS**

1. The Circuit Court properly granted summary judgment in favor of the Appellees to correct its 1935 Order to include the provision that the oil and gas interests underlying Parcel 2's 16.89 acres were to be held in common by the Kester heirs where it clearly intended that the Kester mineral interests were to be held in common by the Kester heirs and such were the only Kester mineral interests, other than those under city or cemetery lots, which were not specifically reserved unto the Kester heirs by said Order.

2. A Court may at any time of its own initiative or on the motion of any party, correct clerical mistakes and errors in orders arising from oversight or omission.

**STANDARD OF REVIEW**

The standard of review for summary judgment is *de novo*. Williams v. Precision Coil, 194 W.Va. 52, 58, 459 S.E.2d 329, 335 (1995).

**POINTS AND AUTHORITIES RELIED UPON**

**Supreme Court of Appeals of West Virginia Decisions:**

<u>Boggess v. Milam</u> .....	1
127 W.Va. 654, 34 S.E.2d 267 (1945)	
<u>Consolidated Gas Supply Corp.v. Riley</u> .....	1, 2, 7
161 W.Va. 782, 247 S.E.2d 712 (1978)	
<u>Hall v. Vernon</u> .....	1
47 W.Va. 295, 34 S.E. 764 (1899)	
<u>Johnson v. Nedeff</u> .....	5, 6
192 W.Va. 260, 452 S.E.2d 63 (1994)	
<u>Morley v. Smith</u> .....	1,2
93 W.Va. 682, 118 S.E. 135 (1923)	
<u>Robertson Consolidated Land Co. v. Paull</u> .....	1, 2
63 W.Va. 249, 59 S.E. 1085 (1907)	
<u>Savage v. Booth</u> .....	1, 5, 6, 7
196 W.Va. 65, 468 S.E.2d 318 (1996)	
<u>Williams v. Precision Coil</u> .....	viii
194 W.Va. 52, 459 S.E.2d 329 (1995)	
<u>Wood County Petroleum Co. v. West Virginia Transportation Co.</u> .....	1
28 W.Va. 764 (1899)	

**Statutes:**

W.Va. Code §37-4-1 (1931) .....	1, 2
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**Rules:**

<i>West Virginia Rules of Civil Procedure</i> Rule 60(a) .....	4, 6
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## ARGUMENT

Because no genuine issue of material fact existed as agreed by the parties and the Circuit Court had the authority to correct a clerical error of omission in its December 1935 Order, the Appellees were entitled to judgment as a matter of law. Therefore, the Circuit Court properly granted summary judgment in favor of the Appellees. *See* Syl. Pt. 1, Consolidated Gas Supply Corp.v. Riley, 161 W.Va. 782, 247 S.E.2d 712 (1978)(summary judgment proper where no genuine issues of material fact and movant entitled to judgment as a matter of law); *see* Savage v. Booth, 196 W.Va. 65, 468 S.E.2d 318 (1996)(court may correct clerical error at any time).

I. THE CIRCUIT COURT CLEARLY INTENDED THAT THE KESTER MINERAL INTERESTS WERE TO BE HELD IN COMMON BY THE KESTER HEIRS.

The 1935 Orders clearly evidence that the Circuit Court understood the law with respect to partitioning oil and gas interests and that it intended to comply with such law. In 1935, the law was that oil and gas interests could not be partitioned in kind, but only by way of sale. West Virginia Code §37-4-1 (1931) only authorized partition of real property interests. However, oil and gas “because of their [fugacious] nature were not subject to absolute ownership until reduced to actual possession”, and, therefore, were not considered interests in real property. Wood County Petroleum Co. v. West Virginia Transportation Co., 28 W.Va. 764 (1899)(overruled in this respect by Bogges v. Milam, 127 W.Va. 654, 34 S.E.2d 267 (1945)). Accordingly, West Virginia Code §37-4-1 (1931) did not authorize partition in kind of oil and gas interests when the Circuit Court entered the 1935 Orders at issue. *See* Exhibits B and C. *See* Hall v. Vernon, 47 W.Va. 295, 34 S.E. 764 (1899)(partition in kind could not be made of oil and gas); Morley v. Smith, 93 W.Va. 682, 118 S.E. 135 (1923)(no partition of oil and gas interests in kind where showing of oil and gas deposits in paying quantities); Robertson Consolidated Land Co. v. Paull, 63 W.Va. 249, 59 S.E. 1085 (1907)(citing with approval numerous cases supporting the position

that oil and gas interests were not susceptible to partition in kind); Syl. Pt. 4, Consolidated Gas, 247 S.E.2d 712 (“As a result of the 1939 amendment to W.Va. Code, 37-4-1, there is a statutory right to have partition in kind considered where mineral interests are involved.”).

Although West Virginia Code §37-4-1 (1931) did not authorize partition of oil and gas interests, Appellant contends that the Circuit Court intended that the mineral interests under Parcel 2's 16.89 acres be partitioned but that each of the other numerous mineral interests owned by W.G. Kester was to be held in common by the Kester heirs and not partitioned. The cases cited in support of the Appellant's position that the Circuit Court had authority to partition in kind the oil and gas interests under Parcel 2's 16.89 acres actually support the Appellees' position that in 1935, the law provided that mineral interests could not be partitioned in kind. *See Morley v. Smith*, 93 W.Va. 682, 118 S.E. 1135 (1923). In *Morley*, numerous people owned surface interests and others owned oil and gas interests thereunder. A fee simple owner of an undivided interest petitioned the court for partition of the surface, claiming that the land was susceptible to partition in kind. Defendant United Fuel and Gas Company, an owner of oil and gas interests only, denied that the surface was susceptible to partition. The *Morley* Court, in a narrow holding, merely ruled that if a co-owner in the fee conveys to a third party his undivided interest to underlying minerals, the grantee of the mineral interests will not defeat the right of the co-owners in the surface from obtaining a partition in kind and the grantee will have his mineral interests confined to the surface awarded to his grantor in the partition suit. *See Morley*, 118 S.E. 1135; *see also, Consolidated Gas*, 247 S.E.2d at 789 (explaining the narrow ruling of *Morley*); *Robertson Consolidated*, 59 S.E. at 1086 (undivided mineral interests can only be partitioned by a sale thereof and a division of the sales proceeds)(citing with approval *Kemble v. Kemble*, 44

N.J. Eq. 454, 11 Atl. 733 (“Partition of lands containing minerals cannot be ordered if the location, extent, and value of said deposits cannot be ascertained.”)).

The record clearly shows that the Circuit Court understood that partition in kind of oil and gas interests was not available to the Kester heirs by stating in paragraph 3 of its September 1935 Order that the mineral interests were “not susceptible to partition in kind and should continue to be held in common by [the four Kester heirs].” See Exhibit B at page 348. In paragraph 3, the Circuit Court listed the mineral interests owned by W.G. Kester, noting whether such were subject to lease and if known, whether producing. The Circuit Court included in such list each and every mineral interest owned by W.G. Kester except those under city or cemetery lots and those under Parcel 11, being 29.70 acres; Parcel 27, being 93.35 acres; and Parcel 2, being the 16.89 acres at issue.

In paragraph 4 of its Order, the Circuit Court ordered that each of the Kester heirs was entitled to a one-fourth (1/4) undivided interest in the “lots, tracts and parcels of land and *mineral* interests”, and further ordered that each was entitled to a like interest and that each was entitled to partition in kind of “all said lots, tracts and parcels of land”, but excepted from partition their interest in the listed mineral tracts, being (i) mineral interests only in Parcel 3; (ii) oil and gas interests underlying Parcels 1, 6, 8, 22 and 23; and (iii) coal underlying Parcel 23. Exhibit B at pages 348 and 349, erroneously referring to coal under Parcel No. 23, rather than as previously stated correctly under Parcel No. 26. (emphasis and underscores added). Again, the Court did not include in its list of mineral interests to be held in common by the Kester heirs those mineral interests underlying city or cemetery lots and those mineral interests under lease in Parcel 2, being the oil and gas interests at issue, and Parcels 11 and 27.

The record is clear that this Court realized that it had inadvertently omitted to exclude from partition certain mineral interests in its September 1935 Order. The Circuit Court's September 1935 Order did not include the mineral interests of Parcels 11 and 27 among those specifically listed to be held in common; however, its December 1935 Order stated, "the assignment of said ... [Parcel 27] and [Parcel 11] does not include the oil and gas thereunder *heretofore decreed to be held in common*". See Exhibit C at pages 5-6 (emphasis added). Accordingly, the Circuit Court's December 1935 Order evidenced its acknowledgment of this oversight and correction thereof by specifically excluding from partition such oil and gas interests under the 29.70 acre tract. Unfortunately, in its December 1935 Order, the Circuit Court and counsel of record again failed to notice and, thus correct, this omission with respect to such interests under Parcel 2. See Exhibit C at pages 5-6.

Thus, of the numerous mineral interests owned by W.G. Kester at his death, the only ones the December 1935 Order not specifically list to be held in common by the Kester heirs were those under city or cemetery lots and those under Parcel 2, being the 16.89 acre tract. See Schedule 1 attached hereto and Exhibit D. Clearly, the Circuit Court's omission of the oil and gas under the 16.89 acre tract from such list was a "clerical mistake" susceptible to correction at any time as discussed *infra*.

## II. THE CIRCUIT COURT HAD THE AUTHORITY TO CORRECT CLERICAL ERROR OF AN INADVERTENT OMISSION IN ITS 1935 ORDER.

The Circuit Court properly corrected its December 1935 Order because its failure to specifically reserve unto the Kester heirs the mineral interests under Parcel 2's 16.89 acres at issue was a clerical error made through oversight or omission. *West Virginia Rules of Civil Procedure* Rule 60(a) permits a court at any time to correct clerical errors where such errors were made through oversight or omission which are part of the record. A Rule 60 motion can only be

used to make the record “speak the truth” and cannot be used to adversely affect the rights of parties or alter the substance of the order beyond what was intended. Savage, 468 S.E.2d at 322.

As discussed *supra*, it is illogical for the Circuit Court to (i) address whether W.G. Kester owned mineral interests under the numerous surface tracts; (ii) state that such mineral interests were not susceptible to partition in kind; (iii) specifically exclude from partition all of the mineral interests addressed; (iv) realize that the mineral interests under Parcels 11 and 27 were omitted from its list of interests excluded from partition and corrected such error; and (v) then essentially partition in kind the mineral interests under Parcel 2's 16.89 acres by omitting to specifically exclude such interests from partition. Even assuming that the law authorized partitioning oil and gas interests in kind in 1935, the Circuit Court clearly intended that the Kester mineral interests were to be held in common, and, thus, its omitting to specifically exclude the mineral interests under Parcel 2 was clearly a clerical mistake as defined by applicable case law. See Savage, 468 S.E.2d at 321 (“[I]f the intention to include a particular provision in the judgment was clear, but the judge neglected to include the provision, [Rule 60(a)] authorizes correction of the judgment.”)(citing Charles A. Wright, Arthur R. Miller, and Mary Kay Lane, 11 Federal Practice and Procedure §2854 (2004)); see also, Savage, 468 S.E.2d at 322 (citing Johnson v. Nedeff, 192 W.Va. 260, 452 S.E.2d 63, 68 (1994) and numerous other cases explaining that “clerical errors” were those that were apparent from the record, capable of being corrected by reference to the record only and which naturally excluded any idea that its insertion [or omission] resulted from a exercise of judgment or discretion).

As further evidence of the Circuit Court’s intent that the mineral interests were to be held in common by the Kester heirs, the Kester heirs and their successors in interest, including the Appellant, acted consistently with such position for almost seventy (70) years: each will, Estate

Appraisal and property tax ticket illustrated the Kester heirs as holding the mineral interests in common; each deed conveying the subject mineral interests was consistent with ownership in common, including the deed whereby Appellant purchased an undivided 1/4 interest in the oil and gas under Parcel 2's 16.89 acres; and the royalties from all mineral interests were applied to retire the debt against the surface tracts awarded to the individual Kester heirs under the partition suit. If the subject mineral interests were producing under the lease in place in 1935 and such interests were in fact partitioned in kind to John M. Kester as contended by the Appellant, his rights would have been adversely affected because he would have been entitled to one hundred percent (100%) of the royalties therefrom but yet would have been required to use all of such to retire the debt on his siblings' surface tracts awarded under the partition.

Thus, the Circuit Court properly corrected its mistake of omission pursuant to *West Virginia Rules of Civil Procedure* Rule 60(a) to make its Orders "speak the truth" of what it originally pronounced in that the Kester oil and gas interests were not susceptible to partition in kind by specifically excluding from partition those interests under Parcel 2. See Johnson, 452 S.E.2d at 68 (internal cite omitted). Even before the enactment of Rule 60(a), it was generally accepted that a court has inherent power at any time to correct an error of record which prevents it from expressing the judgment rendered, no matter by whom the error made. Savage, 468 S.E.2d at 322 (quoting W.Va. Code §58-2-5, predecessor to Rule 60(a).).

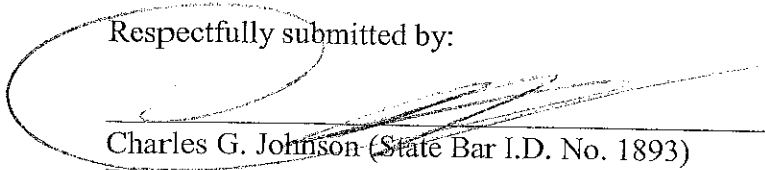
### III. PRAYER OF RELIEF

Because the parties did not dispute the relevant facts in this case and the Circuit Court clearly intended that the Kester mineral interests were not susceptible to partition in kind and, therefore, should be held in common, the Circuit Court properly granted summary judgment in favor of the Appellees to correct its 1935 Orders to specifically exclude from partition the

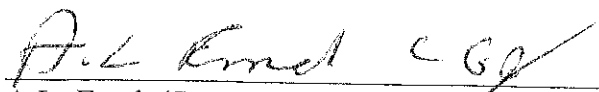
III. PRAYER OF RELIEF

Because the parties did not dispute the relevant facts in this case and the Circuit Court clearly intended that the Kester mineral interests were not susceptible to partition in kind and, therefore, should be held in common, the Circuit Court properly granted summary judgment in favor of the Appellees to correct its 1935 Orders to specifically exclude from partition the mineral interests under Parcel 2. See Syl. Pt. 1, Consolidated Gas, 247 S.E.2d 712; Savage, 468 S.E.2d at 322. Thus, the Appellees pray that this Court uphold the Circuit Court's Order entered June 22, 2004, granting summary judgment in favor of the Appellees and correcting its 1935 Orders to reflect the Circuit Court's intent that the oil and gas interests under Parcel 2's 16.89 acres be held in common by the Kester heirs.

Respectfully submitted by:

  
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Parcel No.	Description	City/Cemetery Lot (Y/N)	Coal, O&G Lease (Y/N)	Producing (Y/N)	Mineral Interest Addressed (Y/N) 9/35 Order	Mineral Interest Addressed (Y/N) 12/35 Order	Awarded to:
1	134.5 acres, Nutters Run & Elk Creek, Clark District. (Includes lots listed below.)		Y	Y	Y	Y	Oil & Gas "In Common"
	Lot 1	Y					John
	Lot 2	Y					Elizabeth
	Lot 3	Y					Earl
	Lot 4	Y					John
	Lot 5	Y					Elizabeth
	Lot 6	Y					Cecil
	Lot 7	Y					John
	Lot 8	Y					Earl
	17.68 acres	N					Elizabeth
	106.75 acres	N					Earl

**SCHEDULE 1**

Parcel No.	Description	City/Cemetery Lot (Y/N)	Coal, O&G Lease (Y/N)	Producing (Y/N)	Mineral Interest Addressed (Y/N) 9/35 Order	Mineral Interest Addressed (Y/N) 12/35 Order	Awarded to:
2	17 acres, being 16.89, Davison's Run, Simpson District		Y	N	N	N	John
3	1/21 int. in O&G, Coal, Minerals on 400 acres, or about, near town of Bridgeport	N	N	N	Y	N	9/35 Order "In Common"
4	Lots 184 & 185, Alta Vista Add., Clarksburg	Y	N	N	N	N	Earl
5	1/7 int. in 2 acres (Ann Moore's Run)	N	N	N	N	N	Elizabeth
6	1/6 oil & 1/2 gas of all royalties arising from all gas wells, 6 acres, Zack's Run, Elk Creek	N	Y	Y	Y	N	9/35 Order "In Common"
7	Lots 83, 84, 85, Alta Vista Addition, City of Clarksburg	Y	N	N	N	N	Elizabeth
8	1 acre, Water St., City of Clarksburg, (29/32 int. in producing oil or gas well)	Y	Y	Y	Y	N	9/35 Order "In Common"
9	Lots 1 & 2, Quiet Dell	Y	N	N	N	N	Elizabeth
10	Lot 6, Grasselli, Harrison County						Overlooked - not assigned to anyone
11	29.70 acres, Nutter's Run, Elk Creek, Clark District		Y	N	N	Y	John - Surface "In Common"

Parcel No.	Description	City/Cemetery Lot (Y/N)	Coal, O&G Lease (Y/N)	Producing (Y/N)	Mineral Interest Addressed (Y/N) 9/35 Order	Mineral Interest Addressed (Y/N) 12/35 Order	Awarded to:
12	Lots 249 & 250, Clarksburg Industrial Addition, Clarksburg	Y	N	N	N	N	Earl
13	Lot No. 174, Alta Vista Addition, Clarksburg	Y	N	N	N	N	Elizabeth
14	Lot No. 145 in Elk View Cemetery, Clarksburg	Y					Overlooked - not assigned to anyone
15	Lots 6 & 7, Elk Grove Addition, Clarksburg	Y	N	N	N	N	Earl
16	Lots 30 & 31, Elk Grove Addition, Clarksburg, surface conveyed to W. G. Hester subject to oil & gas lease	Y	Y	N	N	N	Elizabeth
17	Mt. Zion Cemetery, Simpson District	Y	N	N	N	N	Numerous lots awarded to each
18	Small parcel of land situate on Elk Creek, Clark District, Harrison County						Overlooked - not assigned to anyone
19	Lot 595, Norwood Addition, Clarksburg	Y	N	N	N	N	John
20	Lots 176 & 177, Norwood Addition, Clarksburg	Y	N	N	N	N	Elizabeth
21	Lots 594 & 506, Norwood Addition, Clarksburg	Y	N	N	N	N	John

Parcel No.	Description	City/Cemetery Lot (Y/N)	Coal, O&G Lease (Y/N)	Producing (Y/N)	Mineral Interest Addressed (Y/N) 9/35 Order	Mineral Interest Addressed (Y/N) 12/35 Order	Awarded to:
22	150.46 acres, Hastings's Run, Elk District	N	Y	Y	Y	Y	Elizabeth
23	291.13 acres Total in Booth's Creek: (a) 172.26 acres (b) 73.87 acres (c) 5 acres (d) 40 acres	N	Y	Y	Y	Y "In Common"	Cecil - Surface
24	Lot 5, White's Subdivision of School Lot to White's First Add. & 6600 sq. ft.						Overlooked - not assigned to anyone
25	Lot E, Norwood Addition, Clarksburg	Y	N	N	N	N	Earl
26	1/7 Coal interest	N	N	N	Y	N	9/35 Order "In Common"
27	93.35 acres, Nutters Run	N	Y	N	N	Y "In Common"	John - Surface
28	Lot D, Norwood Addition, Clarksburg	Y	N	N	N	N	Earl (north end) Elizabeth (south end)
29	Lots 955 & 956, Fair Grounds Add., Clarksburg	Y	N	N	N	N	Elizabeth

Case No. : 32530  
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  

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CHARLESTON

WILLIAM M. KESTER and  
ORIAN LEE NUTTER, II,  
Appellees,

v.

CIVIL ACTION NO.: 03-C-246-2  
Circuit Court of Harrison County

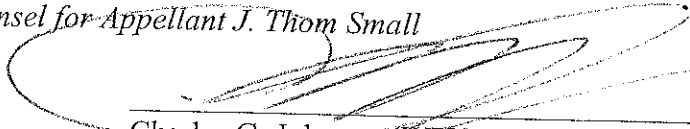
J. THOM SMALL, DIVERSIFIED  
RESOURCES, INC., a West Virginia  
Corporation; J. CARL PALMER,  
ELIZABETH A. DODD, and  
ADAM F. WILSON, Beneficiary of the  
Estate of NELMA M. WILSON, Deceased,  
Defendants Below

J. THOM SMALL, Appellant.

CERTIFICATE OF SERVICE

I hereby certify that on the <sup>11</sup> day of April, 2005, I served a copy of the foregoing  
"Brief on Behalf of Appellees" upon the following counsel of record by depositing a true copy  
thereof in the United States Mail, postage prepaid, in an envelope addressed as follows:

Thomas W. Kupec, Esq.  
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*Counsel for Appellant J. Thom Small*

  
Charles G. Johnson (WV Bar ID No.: 1893)  
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