Volume 43 | Issue 4 Article 12

June 1937

Mines and Minerals--Mining By Mortgagor In Possession--Rents and Profits Under Mineral Lease

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not appear to have been generally observed where the prior lease was for a designated term.[9]

Aside from the consideration of authority,[10] it would appear that there is no serious objection to such a rule except in the case of farm lands, to which it would probably not be applied. In favor of such a rule there is the belief on many sides[11] that a tenancy from year to year is too lengthy a term to impose by implication of law. Moreover, it is possible that our court thought it undesirable in the principal case to encourage the raising of an odd term tenancy by mere implication.

J. G. McC.

MINES AND MINERALS — MINING BY MORTGAGOR IN POSSESSION — RENTS AND PROFITS UNDER MINERAL LEASE. — *A* conveyed land on which coal was being mined to *T* under a deed of trust to secure notes held by *B*. *A* then leased the land to *X* for mining purposes, subject to the deed of trust, and gave *X* the option to pay royalties to *T* on the debt. *A* and *B* joined in an action to recover royalties. *B* now sues to recover a portion of the royalties collected from *X*, claiming that the beneficiaries under the trust deed had an interest in such money as a matter of law, and that *X*'s option to apply the royalty payments to the trust debt constituted an assignment to *B* of such royalties. *Held*, that where coal land is conveyed to secure a debt, the grantor may continue mining operations and keep the proceeds until the trust has been enforced, the mining enjoined, or the royalties sequestered. *Minor v. Pursglove Coal Mining Co.*[1]

This holding is important only in so far as it involves the right of the trustee to rents and profits already collected by the grantor in possession of the trust property. It is well settled that as to prospective income from the trust property the trustee may protect the security for the debt by any one of several remedies:

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[9] Bright v. McOuat; Rothschild v. Williamson; Bollenbacker v. Fritts, all *supra* n. 8. The facts of few of the cases show whether an entire rent for the term has been reserved, or whether a monthly or other periodic rent for less than the term has been reserved. Some of the cases hold that in the absence of a fixed term in the prior lease, the rental period would be used to determine the length of the holdover tenancy. Steffens v. Earl, 40 N. J. L. 128 (1878).

[10] The concurring opinion of Judge Litz frankly admits that this rule is contrary to the weight of authority, but justifies the court's holding in the principal case on the fact that the rule has become settled law in West Virginia.

[11] Ellis v. Paige, 18 Mass. 43, 46 (1822).

[1] 189 S. E. 297 (W. Va. 1937).

He may enjoin further operation of the mines as waste, if it endangers his security right;[2] he may foreclose and gain possession, if the debtor is in default;[3] he may obtain a decree sequestering further profits, after which they will be paid into court for the trust debt;[4] or he may in West Virginia elect the statutory remedy, analogous to the common-law writ of estrepement, in case of a pending action concerning the property.[5] Here none of these opportunities to safeguard the creditors' rights was exercised. It appears that such being the case, the trustee is clearly not entitled to royalties collected by the equitable owner in possession.[6]

As to this question, the chief contention of the noteholders was that the grantor in possession impliedly contracted to preserve the security rights of the creditors, and that this contract was being violated by the working of the mines. However, even granting this contention, and assuming that the operation of the mines was wrongful for that reason, it does not follow that the trustee can recover the royalties before he has gained possession, or enforced one of his other remedies. There appears to be little authority in support of the creditors' claim to the royalties collected prior to such action by the trustee.[7]

The parties in the case were in direct conflict as to whether, as a matter of fact, the mines were open at the time of the conveyance to the trustee. Of course, if the mines had not been opened, their operation was waste, and the trustee should clearly recover the profits as damages therefor. However, if, as the court

[2] Collins v. Rea, 127 Mich. 273, 86 N. W. 811 (1901); Clarke v. Curtis, 1 Gratt. 289 (Va. 1844); Note (1911) 60 U. OF PA. L. REV. 135.

[3] Granite Hall Farms Corp. v. Virginia Trust Co., 154 Va. 341, 153 S. E. 843 (1930). This is of course the common remedy of the mortgagee (trustee) in case of default.

[4] Clarke v. Curtis, 1 Gratt. 289 (Va. 1844). This remedy is the one claimed by the noteholders in the principal case, but it will be observed that an express court order, which is not retroactive, is necessary. Under this remedy may be included the right to have a receiver appointed to collect the profits. See in connection with this problem, Note (1923) 26 A. L. R. 33.

[5] W. VA. REV. CODE (1931) c. 37, art. 7, § 5. See discussing the common-law writ of estrepement, Smith v. Chappell, 25 Pa. Super. Ct. 81 (1904).

[6] Childs v. Hurd, 32 W. Va. 66, 9 S. E. 362 (1889); Cox v. Horner, 43 W. Va. 786, 28 S. E. 780 (1897); Frayser's Adm'r v. R. & A. R. R. Co., 81 Va. 388 (1886) (citing cases in Virginia); Teal v. Walker, 111 U. S. 242, 4 S. Ct. 425 (1884). These cases merely state the unanimous conclusion of the courts on this point. There seem to be no dissenting cases.

[7] Davis v. Virginia Ry. & Power Co., 229 Fed. 633 (1915); Vanderslice v. Knapp, 20 Kan. 647 (1878). These cases show the existence of the mortgagor's implied contract as stated, but do not, as will be seen on examination, grant the remedy claimed here.

decided, the mines were open, then the grantor was not even committing an enjoinable wrong unless the mining operations impaired the security for the debt.[8]

It has been suggested that the first action, in which the noteholders joined, was analogous to a suit for sequestration or a writ of estrepement, and that they should therefore be entitled to the royalties collected in that action. However, the grantor's right to the royalties accrued prior to the commencement of that action, and as to the noteholders the royalties should be considered as having been collected when the right to them accrued. Moreover, the fact that the pleadings in the former action showed no intention of the noteholders to accomplish such a result, is fatal to this contention.[9]

It is therefore submitted that the case was correctly decided, in accord with the apparently unanimous authority on the point.[10]

C. A. P., JR.

PLEADING — CERTAINTY — PROXIMATE CAUSE. — In an action for injury caused to *P*'s property in Ohio by *D*'s blasting operations in West Virginia,[1] *P* alleged that *D* owed a duty of care in the use of explosives which he failed to exercise; "that the nitroglycerin, dynamite, and other explosives exploded with such great force and violence that the plate glass of the plaintiff stored in the room occupied by him in Steubenville, Ohio, was destroyed, to the plaintiff's damage." *D* demurred to the declaration. The circuit court overruled the demurrer. Questions certified to the supreme court. *Held*, that the declaration was defective in that it failed

[8] The actual facts do not seem to have been controverted here, but there was a question as to the extent of the mines legally "opened" by the operations begun prior to the deed of trust. This question for the purposes of this comment is one of fact, and was decided in favor of the grantor.

[9] Childs v. Hurd, 32 W. Va. 66, 9 S. E. 362 (1889); Higgins v. The York Building Co., 2 Atk. 107 (1840). There is apparently no authority which would construe the prior action as something which it was not.

[10] Needless to say, the actual result in the principal case leaves something to be desired. The plaintiffs, holders in due course of the notes for which the trust deed was given, are left without a remedy. It would also seem on principle that if an enjoinable wrong was being committed (which does not appear) then recovery should be had after the fact. The chief difficulty seems to lie in the lack of distinction between the case of an ordinary lease, and that of a mineral lease, when there may be impairment of security. However, the law appears to be settled in both instances, and probably in most cases it is fair to restrict the mortgagee to the exercise of his various other remedies.

[1] The court held as to the substantive law that the law of Ohio applied since the injury resulted in that state.